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Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation

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INTRODUCTION

Punitive damages constitute an award to an injured party above what is necessary to compensate for actual loss.[1] The making of exemplary awards is common to many cultures; ex-

[1] *See* Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 432 (1976-77).

amples can be found in the legal systems of ancient Babylonia,[2] Israel,[3] Rome,[4] India,[5] and medieval England.[6]

The modern concept of punitive damages originated in England during the eighteenth century[7] and has been accepted in the

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[2] Provisions allowing the recovery of some multiple of actual damages appear in the Babylonian Code of Hammurabi, which dates from about 2000 B.C. *See* G. DRIVER & J. MILES, THE BABYLONIAN LAWS 500-01 (1952). The Babylonian Code allowed the owner of stolen property to recover from two to thirty times its value from the thief. *See* Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 29 UMKC L. REV. 1, 2 (1980-81).

[3] The Mosaic law of the ancient Hebrews also permitted multiple recovery of compensatory damages. Thus, according to the Book of Exodus, "If a man steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep." *Exodus* 22:1. *See also* B. JACKSON, THEFT IN EARLY JEWISH LAW 41-48 (1972); Peters, *Punitive Damages in Oregon*, 18 WILLAMETTE L.J. 369, 371-72 (1982).

[4] *See* Note, *After the Hyatt Tragedy: Rethinking Punitive Damages in Mass Disaster Litigation*, 23 WASHBURN L.J. 64, 66 (1983). For example, under the Law of the Twelve Tables, the victim of a theft in some instances was able to recover twice the value of the stolen property. *See* W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 577-79 (1921); H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 288-89 (2d ed. 1952).

[5] The Hindu Code of Manu, dating from about 200 B.C., contained at least one provision for multiple damages. *See* M. BELLI, MODERN DAMAGES 84 (1959); Igoe, *Punitive Damages: An Analytical Perspective*, 14 TRIAL 48, 50 (1978); Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984).

[6] Provisions for double, treble or quadruple damages were also common in medieval legislation. As early as 1236 the Statute of Merton declared that an heir who married without his lord's consent would be liable to him for twice the value of the marriage. Stat. of Merton, 29 Hen. 3, ch. 6 (1236). *See also* T. PLUCKNETT, THE LEGISLATION OF EDWARD I 116 (1949). The first Statute of Westminster, dating from the year 1275, stated that "trespassers against religious persons shall yield double damages," 3 Edw. 1, ch. 11 (1275), and contained a number of similar provisions for double and treble damages. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 522 n.1 (2d ed. 1911). Finally, the Statute of Gloucester, promulgated in 1278, authorized an award of treble damages to a party injured by waste. 6 Edw. 1, ch. 5 (1278).

[7] English judges developed the modern concept of punitive damages in the eighteenth century to explain jury verdicts that greatly exceeded any tangible harm to the plaintiff. *See* Borowsky, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F.L. REV. 147, 152 (1982-83); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-19 (1956-57) [hereinafter cited as *Exemplary Damages*]. According to these English jurists, large damage awards were meant to compensate for mental suffering, wounded dignity and similar injuries not then recoverable as compensatory damages. *See* Tullidge v. Wade, 95 Eng. Rep. 909 (P.C. 1769); Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1766); Beardmore v. Carrington, 95 Eng. Rep. 790 (K.B. 1764); Note, *Pretrial Discovery of Net Worth in Punitive Damages Cases*, 54 S. CAL. L. REV. 1141, 1142-43 (1980-81) [hereinafter cited as *Pretrial Discovery*]; Comment,

United States for more than 150 years.[8] Presently, all but five states recognize the practice of awarding punitive damages in civil cases.[9]

Over the years legal scholars have offered a variety of justifications for the doctrine of punitive damages. Punishment is

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Punitive Damages: An Appeal for Deterrence, 61 NEB. L. REV. 651, 652 (1982).

The English courts of the time also acknowledged the retributive and deterrent functions of punitive damages. *See* Anderson, *Indemnity Against Punitive Damages: An Examination of Punitive Damages, Their Purpose, Public Policy, and the Coverage Provisions of the Texas Standard Automobile Liability Insurance Policy*, 27 SW. L.J. 593, 594 (1973). For example, in Wilkes v. Wood, 95 Eng. Rep. 766, 98 Eng. Rep. 489 (P.C. 1763), John Wilkes, the publisher of an anti-government newpaper, brought a trespass action against government agents who searched his house under an illegal warrant. At trial, Wilkes asked for "large and exemplary damages" since a trifling award would not be sufficient to deter this type of conduct in the future. 98 Eng. Rep. at 490. The court upheld a jury verdict of 1000 pounds declaring:

> . . . I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter them from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself. . . .

98 Eng. Rep. at 498-99. *See also* Huckle v. Money, 95 Eng. Rep. 768-69 (K.B. 1763). This principle was quickly accepted in England, and by the late eighteenth century the jury's right to award punitive damages was firmly established. *See* Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 309 (1969-70).

[8] The first reported case involving punitive damages in America was Genay v. Norris, 1 S.C. 3 (1784). Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L. Q. 241, 259 (1985). Note, *Punitive Damages in Products Liability: A Layman's Guide for the Manufacturer's Protection*, 13 CAP. U.L. REV. 435, 438 (1984). In *Genay*, the defendant added a dose of Spanish fly to the plaintiff's wine, causing him to become ill. *See also* Coryell v. Colbaugh, 1 N.J.L. 77 (1791). By the middle of the nineteenth century the United States Supreme Court was compelled to admit that the doctrine of punitive damages had become so well embedded in American law that "to question the awarding of punitive damages will not admit of argument." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851). *See also* Comment, *supra* note 7, at 657.

[9] Louisiana, Nebraska and Puerto Rico prohibit punitive damages entirely. *See* Ganapolsky v. Park Gardens Dev. Corp., 439 F.2d 844, 846 (1st Cir. 1971) (applying Puerto Rican law); Ricard v. State, 390 So. 2d 882, 884 (La. Ct. App. 1980), *aff'd*, 446 So. 2d 901 (La. 1984); Boutte v. Hargrove, 277 So. 2d 757, 760 (La. Ct. App. 1973), *aff'd*, 290 So. 2d 319 (La. 1974); Prather v. Eisenmann, 261 N.W.2d 766, 772 (Neb. 1978); Abel v. Conover, 104 N.W.2d 684, 689 (Neb. 1960). Massachusetts and Washington also prohibit punitive damages except when specifically allowed by statute. *See* Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968); City of Lowell v. Massachusetts Bonding & Ins. Co., 47 N.E.2d 265, 272 (Mass. 1943); Maki v. Aluminum Bldg. Prods., 436 P.2d 186, 187 (Wash. 1968). Indiana allows punitive damages, but only if the defendant's conduct is not also punishable as a crime. *See* Moore v. Waitt, 298 N.E.2d 456, 460 (Ind. App. 1973).

one popularly accepted rationale.[10] According to proponents of this theory, wrongdoers deserve punishment beyond that which results from the imposition of compensatory damages,[11] and punitive damages fulfill this retributive function.

Punitive awards also help preserve public order by providing aggrieved parties with an attractive substitute for revenge[12] and the more violent forms of self-help.[13] As such, punitive awards are especially useful when adequate criminal sanctions are not readily available to the plaintiff.[14] In addition, punitive damages act as a "law enforcement" mechanism by encouraging private individuals to uphold legal norms.[15] In particular, punitive damages help offset the expense of prosecuting meritorious claims when compensatory damages alone are likely to be modest.[16]

Punitive damages also provide additional compensation to victims of wrongdoing.[17] Early English common law did not compensate plaintiffs for nonpecuniary injuries such as pain and suffering or emotional distress.[18] Nevertheless, the courts often upheld awards which reflected more than economic loss by characterizing them as "exemplary."[19] Today, plaintiffs may recover

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[10] *See* 54 U.S. (13 How.) 363, 371 (1851); Hays v. Houston G.N.R.R., 46 Tex. 272, 280 (1876); Igoe, *supra* note 5, at 50; Note, *supra* note 1, at 433; Note, *supra* note 4, at 66-67.

[11] *See Exemplary Damages*, *supra* note 7, at 522.

[12] *See* Alcorn v. Mitchell, 63 Ill. 553, 554 (1872); Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814); Grey v. Grant, 95 Eng. Rep. 794, 795 (C.P. 1764); Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 FORUM 377, 380 (1982-83); Peters, *supra* note 3, at 382.

[13] *See* Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, 1980 INS. L.J. 257, 258-59; *Pretrial Discovery*, *supra* note 7, at 1146.

[14] *See* Kink v. Combs, 135 N.W.2d, 789, 798 (Wis. 1965); Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 6-8 (1935).

[15] *See* Robinson & Kane, *Punitive Damages in Product Liability Cases*, 6 PEPPERDINE L. REV. 139, 142 (1978-79); Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303, 330-31 (1980).

[16] *See* Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 523 (1885); McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L. REV. 129, 130 (1929-30); Comment, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions*, 75 DICK. L. REV. 585, 590 (1970-71).

[17] *See* Collens v. New Canaan Water Co., 234 A.2d 825, 831-32 (Conn. 1967); Westview Cemetery, Inc. v. Blanchard, 216 S.E.2d 776, 780-81 (Ga. 1975); Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50, 55 (Mich. 1980).

[18] *See* Note, *supra* note 1, at 432; *Pretrial Discovery*, *supra* note 7, at 1142.

[19] *See* 95 Eng. Rep. at 909; 95 Eng. Rep. at 792-93. *See also* Hink v. Sherman,

for these sorts of intangible injuries, but attorneys' fees and other litigation expenses generally still are not included as part of the compensatory damage award.[20] Consequently, some commentators maintain that punitive damages continue to serve a compensatory function by defraying these costs.[21] A final rationale for the doctrine of punitive damages is deterrence. Proponents of punitive damages claim that civil sanctions discourage tortfeasors and other potential wrongdoers from engaging in similar misconduct in the future.[22]

Although punitive damages have been accepted for more than two centuries, some courts[23] and commentators[24] have voiced serious doubts about the continuing usefulness of this concept in American jurisprudence. For example, critics have charged that punitive damages are inconsistent with accepted damages principles[25] and amount to an undeserved windfall to the plaintiff.[26] In addition, some scholars have questioned whether pun-

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129 N.W. 732, 734 (Mich. 1911); Fay v. Parker, 53 N.H. 342, 380 (1873); Stuart v. Western Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885); Flanagan v. Womack & Perry, 54 Tex. 45, 47 (1880); Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1005, 1007 (1980-81); Formby, *Insurability Against Punitive Damages: A Call for Reform*, 23 S. TEX. L.J. 443, 445-46 (1982).

[20] Note, *supra* note 8, at 439.

[21] *See* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES—LAW AND PRACTICE § 2.11 (1984); Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages—The Insurance Policy and The Public Policy*, 40 J. AIR L. & COM. 595, 609 (1974); Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369, 371 (1965-66); Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1790 (1982-83).

[22] *See* Note, *supra* note 8, at 438; Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613, 627-28 (1971-72). *See also* Comment, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895, 899 (1975-76).

[23] *See, e.g.*, Murphy v. Hobbs, 5 P. 119 (Colo. 1884); Fay v. Parker, 53 N.H. 342, 382; Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1073 (Wash. 1891); Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672-74 (1877).

[24] *See* Duffy, *Punitive Damages: A Doctrine Which Should be Abolished, reprinted in* DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES (D. Hirsch & J. Pouros eds. 1969); Ghiardi, *Should Punitive Damages be Abolished?—A Statement for the Affirmative*, 1965 A.B.A. SEC. INS., NEGLIGENCE AND COMPENSATION LAW 282; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 888-89 (1975-76); Peters, *supra* note 3, at 429-32.

[25] *See* 53 N.H. 342, 382; Hodel, *The Doctrine of Exemplary Damages in Oregon*, 44 OR. L. REV. 175, 180-81 (1964-65).

[26] *See* Riewe v. McCormick, 9 N.W. 88, 89 (Neb. 1881); Note, *Punitive Damages in Mass-Marketed Product Litigation*, 14 LOY. L.A.L. REV. 405, 429 (1980-81).

ishment is a proper function of the civil system.[27] They also have expressed concern that many of the safeguards available to a criminal defendant are not available to a civil defendant, including the requirements of a higher standard of proof and a unanimous verdict.[28] Moreover, they point out that punitive damages create the risk of subjecting the defendant to a form of double jeopardy when criminal prosecution also is available for the same act of misconduct.[29]

Until recently, courts usually have limited the imposition of punitive damages to situations where the defendent has committed an intentional tort[30] or engaged in criminal behavior, such as driving while intoxicated.[31] In the past decade, however, an increasing number of jurisdictions have permitted imposition of punitive damages against sellers of defective products where the basis of the underlying claim for compensatory damages is negligence or strict liability in tort.[32] Although many commentators have applauded this development,[33] others have questioned the wisdom of introducing the concept of punitive damages into such a rapidly growing area of the law.[34]

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[27] *See* 25 P. at 1073-74; Duffy, *supra* note 24, at 9; Note, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 VA. L. REV. 1036, 1042 (1960).

[28] *See* Ghiardi, *supra* note 24, at 287-88; Note, *Punitive Damages in Mass Tort Litigation—Froud v. Celotex Corp.*, 32 DE PAUL L. REV. 457, 468 (1983).

[29] *See* Murphy v. Hobbs, 5 P. 119, 124-26 (Colo. 1884); Ellis, *supra* note 19, at 1011; *Pretrial Discovery*, *supra* note 7, at 1143. *See also* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 413-17 (1966-67).

[30] *See, e.g.*, Maxa v. Neidlein, 163 A. 202, 204 (Md. 1932) (assault and battery); Bull v. McCuskey, 615 P.2d 957, 961 (Nev. 1980) (malicious prosecution); Jones v. Fisher, 166 N.W.2d 175, 180 (Wis. 1969) (assault and battery).

[31] *See, e.g.*, Brooks v. Wootton, 355 F.2d 177, 178 (2d Cir. 1966); Sebastian v. Wood, 66 N.W.2d 841, 846 (Iowa 1954); Dorn v. Wilmarth, 458 P.2d 942, 945 (Ore. 1969). *See generally* Annot., 65 A.L.R. 3d 656 (1975).

[32] *See* Meyers & Barrus, *Punitive Damages in Products Liability Cases: A Survey*, 51 INS. COUNS. J. 212, 213-16 (1984).

[33] *See generally* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1975-76); Robinson & Kane, *supra* note 15, at 139; Note, *Punitive Damages in Strict Products Liability Litigation*, 23 WM. & MARY L. REV. 333 (1981-82); Comment, *Punitive Damages Awards in Strict Products Liability Litigation: the Doctrine, the Debate, the Defenses*, 42 OHIO ST. L.J. 771 (1981).

[34] *See generally* Ghiardi & Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 MARQ. L. REV. 1 (1981-82); Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351 (1982-83).

Critics of this new development maintain that the nature of the plaintiff's underlying compensatory claim[35] and the likelihood of numerous injuries arising from a single tortious act[36] make punitive damages inappropriate in products liability litigation. Of particular concern is the injection of punitive measures into an area of law that traditionally has eschewed the concept of fault. According to these commentators, if punishment goals are to justify exemplary damages, questions of fairness and desert must also be addressed.[37]

For example, the punishment of shareholders and other innocent parties for the wrongdoing of corporate employees appears both pointless and unjust.[38] In addition, the liability standard for punitive damages arguably fails to provide product manufacturers with a clear idea of the proscribed conduct. This is because the liability standard, typically stated in terms of "malice" or "recklessness," focuses on the mental state of the individual wrongdoer[39] and, therefore, has little relevance to the collective decision making involved in product design cases.[40] For the same reason, juries are seldom given adequate guidance when called upon to evaluate whether the defendant's conduct warrants imposition of punitive damages.[41] Moreover, since there are no specific criteria to determine the proper amount of punitive damages, the product manufacturer runs the risk that the jury will make an excessive award.[42]

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[35] Product manufacturers contend that joinder of a fault-based punitive damages claim along with a compensatory claim grounded in strict liability is conceptually inconsistent and also confuses the jury. *See* Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482, 485 (D.N.J. 1982); Walbrun v. Berkel, Inc., 433 F. Supp. 384, 385 (E.D. Wis. 1976); Nelson, *supra* note 12, at 382-83.

[36] *See* Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F.L. REV. 1, 6 (1981-82); Sales, *supra* note 34, at 370.

[37] *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 4-8 (1982-83); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 143-47 (1982-83).

[38] DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNS. J. 344, 349 (1976); Note, *supra* note 4, at 68-69.

[39] *See* K. REDDEN, PUNITIVE DAMAGES § 3.1(A) (1980).

[40] *See* Sales, *supra* note 34, at 393-94.

[41] *See* Ellis, *supra* note 37, at 38.

[42] *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 44-49 (1982).

Another concern is that, if punitive damages are allowed in design defect cases, the punishment imposed upon the manufacturer may be disproportionate to the degree of wrongdoing. Unlike manufacturing defects, a generic design defect can injure hundreds and perhaps even thousands of consumers.[43] Since many punitive damage awards may result against a manufacturer for a single design decision,[44] the cumulative effect of multiple punitive damage awards could bankrupt a product manufacturer.[45]

Opponents of punitive damages also question whether assessment of these awards against product manufacturers has any deterrent effect. If compensatory damages[46] and criminal sanctions[47] are sufficient to protect the public against injuries

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[43] A manufacturing defect is a one-of-a-kind flaw in a product caused by a deficiency in the manufacturing process. It is readily identifiable because the product differs from the manufacturer's intended result. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 551-52 (1980). A design defect, on the other hand, is a generic condition appearing in every item in the particular product line. Davis, *Strict Liability or Liability Based Upon Fault? Another Look*, 10 U. DAYTON L. REV. 5, 26 (1984); Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. REV. 339, 343 (1974); Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1542-44 (1973). Because of the inadvertant nature of most manufacturing defects, punitive damages are seldom sought or recovered in such cases. *See, e.g.*, Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983); Harley-Davidson Motor Co. v. Wisniewski, 437 A.2d 700 (Md. App. 1981). A punitive damage award was upheld in Willis v. Floyd Brace Co., 309 S.E.2d 295 (S.C. App. 1983), a case involving a defective leg brace, but liability was imposed on the manufacturer for its repeated failure to repair the product, rather than for the original defect. *Id.* at 298-99.

[44] *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-39 (2d Cir. 1967); Putz & Astiz, *supra* note 36, at 6.

[45] *See* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526-27 (5th Cir. 1984); *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); Coccia & Morrissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 22 TRIAL LAW. GUIDE 46, 59 (1978-79); Sales & Cole, *supra* note 5, at 1141-42; Special Project, *An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 690-91 (1983); Comment, *Leichtamer v. American Motors Corp.: Extending Punitive Damages and the Consumer Expectation Test in Products Liability*, 11 CAP. U.L. REV. 363, 370-72 (1981-82).

[46] *See* 378 F.2d 832, 841; Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411, 418 (1972-73); Nelson, *supra* note 12, at 387.

[47] *See* Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J. 300, 304 (1972). *See also* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 655-58 (1979-80) (arguing that punitive damages should

from defectively designed products, then punitive damages are unnecessary as a deterrent. Even if additional deterrence is needed, critics of punitive damages believe that other measures are better suited to the task.[48]

This Article considers whether punitive damages are an effective means of promoting the goals of products liability law. Section I traces the use of punitive damages in products liability litigation from the early 1960's to the present time. Section II examines the traditional rationales for punitive damages and considers whether they are appropriate in the products liability context. Finally, Section III evaluates some of the measures that commentators have proposed to adapt more fully the concept of punitive damages to products liability litigation. Particular emphasis is given to the use of punitive damage class actions in design defect cases.

I. PUNITIVE DAMAGES IN PRODUCTS LIABILITY ACTIONS: AN OVERVIEW

A. The First-Generation Cases

The trend toward punitive damages in the products liability area began slowly at first. *Toole v. Richardson-Merrell, Inc.*[49] and *Roginsky v. Richardson-Merrell, Inc.*,[50] decided in 1967, were the first cases to consider the issue. The result was a split decision: *Toole* upheld an award of punitive damages, while *Roginsky* denied recovery. Both cases involved triparanol, a drug developed and marketed by Richardson-Merrell under the trade name MER/29 for use in the treatment of arteriosclerosis. More than 400,000 persons had taken the drug over a two-year period and thousands of them suffered severe eye injuries.[51]

According to the plaintiffs in *Roginsky* and *Toole*, Richardson-Merrell disregarded test results revealing that laboratory an-

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not be allowed in cases where adequate criminal sanctions have already been imposed on the defendant).

[48] *See* Schwartz, *supra* note 37, at 137-43.

[49] 60 Cal. Rptr. 398 (Cal. Ct. App. 1967).

[50] 378 F.2d 832 (2d Cir. 1967).

[51] *See* Owen, *supra* note 33, at 1330.

imals exposed to triparanol had developed cataracts.[52] Furthermore, the company falsified its reports to the Food and Drug Administration (FDA),[53] ignored increasing evidence of harmful side effects among MER/29 users,[54] and misrepresented the drug's safety in its promotional literature.[55]

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[52] The *Toole* court described these tests in detail. The defendant began animal testing of MER/29 in 1957. In the first test, all female rats on a high dosage died. All were found to have suffered abnormal blood changes, an event regarded as a major danger signal. A second experiment using a lower dosage of MER/29 also resulted in abnormal blood changes in rats. Abnormal blood changes also occurred in a third test involving monkeys that was completed in March, 1959. In January, 1960, Richardson-Merrell completed another study with rats. In this case, ninety percent of the laboratory animals developed eye opacities. In February, 1960, one dog in a test group developed eye opacities and blindness after being given MER/29. In the same month, the defendant completed a long-term test of the drug used in rats; twenty-five of the thirty-six rats in this test group developed eye opacities. 60 Cal. Rptr. at 404-05.

[53] For example, the company reported that only four out of eight rats died in the first experiment when, in fact, all but one died. In addition, fictitious body and organ weights and blood tests were fabricated for the rats that died. Furthermore, none of the abnormal blood changes encountered in the tests was disclosed. Test results from the monkey experiments were also falsified by recording false body weights for the test animals, by creating fictitious data for monkeys that had been killed, by adding data for an imaginary monkey that had been killed, and by adding data for an imaginary monkey that had never been in the test group at all. The defendant also declared that eight of twenty rats in another study had merely developed mild eye inflamations when, in fact, ninety percent of them developed eye opacities. Finally, Richardson-Merrell failed to inform the FDA of the results of tests completed in February, 1960, in which one dog and twenty-five of thirty-six rats in the respective test groups developed eye opacities. *Id.*

[54] In June, 1960, a researcher in Florida informed the defendant of an experiment she conducted in which a number of rats exposed to MER/29 had developed lenticular and corneal eye opacities. Later, in January of the following year, Merck, Sharp & Dohme, another drug company, advised Richardson-Merrell that its long-term testing of MER/29 on rats and dogs showed that many of the test animals had developed cataracts. The defendant did not reveal Merck's findings to the FDA, but in April, 1961, Richardson-Merrell began its own long-term study of the effect of MER/29 on rats and dogs. By August, thirty-five of the forty-six rats had developed opacities, and by October, five of the seven dogs had also developed eye opacities. By this time the company had also begun to receive reports of eye problems and hair loss from doctors and even its own salesmen. *Id.* at 405-06.

[55] Not only did Richardson-Merrell resist the FDA's attempts to have MER/29 taken off the market, but continued to claim that it was "a proven drug, remarkably free from side effects, virtually non-toxic . . . and completely safe." *Id.* at 416. Moreover, the defendant told doctors whose patients suffered hair loss or eye problems that it was not aware of similar complaints from other users of its product. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 119 (1968).

In *Roginsky*, a patient who developed cataracts from using MER/29[56] brought a diversity action in federal district court, seeking both compensatory and punitive damages. The jury returned a verdict for the plaintiff, awarding $17,500 in compensatory damages and $100,000 in punitive damages.[57] On appeal, the federal court of appeals affirmed the compensatory damages award,[58] but held that the trial court should not have submitted the punitive damages claim to the jury.[59]

Judge Friendly, writing for the majority, concluded punitive damages were inappropriate because the corporate officers of Richardson-Merrell had not participated in or ratified the wrongful acts of lower-level employees.[60] Nevertheless, he continued with a lengthy criticism of the practice of awarding punitive damages in products liability actions. Judge Friendly maintained that compensatory damage awards and criminal sanctions were sufficient to discourage manufacturers from marketing defective products, and that punitive damages, therefore, were unnecessary.[61] Furthermore, Judge Friendly expressed concern that the cost of multiple punitive damage awards ultimately would fall

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[56] The plaintiff, who was then sixty years old, began using MER/29 in February, 1961. Several months later he began to experience scaling, rashes, and hair loss. These conditions persisted despite treatment. By the end of the year, disturbing eye symptoms appeared and Roginsky stopped taking the drug. The skin and hair problems disappeared within six months, but the eye problems became worse. The plaintiff's eye problems were later diagnosed as cataracts. 378 F.2d at 836.

[57] Roginsky v. Richardson-Merrell, Inc., 254 F. Supp. 430, 430 (S.D.N.Y. 1966), *aff'd in part, rev'd in part*, 378 F.2d 832 (2d Cir. 1967).

[58] 378 F.2d at 838. The court agreed with the defendant that fraud and misrepresentation with respect to test reports submitted to the FDA would not give rise to any cause of action on behalf of the plaintiff. *Id.* at 837. Nevertheless, the court concluded that the jury's finding of negligence on the part of Richardson-Merrell was sufficient to support an award of compensatory damages. *Id.*

[59] *Id.* at 844.

[60] Judge Friendly concluded that New York followed the "complicity rule," which imposes liability for punitive damages on a corporation only when "superior officers either order, participate in, or ratify outrageous conduct." *See* Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960). According to Judge Friendly, Richardson-Merrell's superior corporate officers failed to exercise proper supervision over their subordinates and were unreasonably slow to acknowledge the risks associated with MER/29; however, he concluded that there was "no proof from which a jury could properly conclude that the defendant's officers manifested deliberate disregard for human welfare." 378 F.2d at 850.

[61] *Id.* at 838-841.

on the public in the form of higher prices or on innocent corporate shareholders.

Nevertheless, a California appellate court reached a different conclusion in *Toole*.[62] The plaintiff in *Toole* also developed cataracts as a result of taking MER/29.[63] Suit was brought against the drug manufacturer based on negligence, express warranty and implied warranty, seeking both compensatory and punitive damages. Finding for the plaintiff, the jury awarded $175,000 in compensatory damages and $500,000 in punitive damages. On appeal, the award of compensatory damages was upheld because the plaintiff had shown that the defendant's testing and marketing procedures were negligent.[64] As in *Roginsky*, the dispute centered around the propriety of awarding punitive damages.

The court in *Toole*, like the *Roginsky* court, held that the complicity rule was applicable, but concluded that high level corporate officers were guilty of wrongdoing.[65] Richardson- Merrell argued that punitive damages were improper because no evidence of malice had been presented.[66] To recover punitive damages, according to the defendant, the court should require the plaintiff to prove that the company deliberately intended to injure him. The court, however, declared the plaintiff could

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[62] 60 Cal. Rptr. 398.

[63] The plaintiff, a forty-three-year-old male, began using MER/29 in July, 1960. "He developed a condition known as ichthyosis, characterized by dry, flaky, red and inflamed skin. He also suffered hair loss over his entire body." After he discontinued using the drug his hair and skin problems disappeared, but cataracts developed and it became necessary to remove the lenses of both eyes. *Id.* at 403.

[64] *Id.* at 408. The court also upheld the trial court's refusal to grant a directed verdict for the defendant on the express warranty and implied warranty counts. *Id.* at 410-14.

[65] According to the court, Dr. Van Maanen, the associate director of research, directed employees in the toxicology department to falsify test results. *Id.* at 404. The court concluded that Dr. Van Maanen was "high enough on the executive scale of responsibility" to hold the corporation liable in punitive damages for his wrongful acts. *Id.* at 415. Furthermore, the company's vice president admitted that "the full body of company knowledge" had not accompanied Richardson-Merrell's application to the FDA. *Id.*

[66] Under California law punitive damages could be awarded only when the defendant has been found guilty of "oppression, fraud, or malice." CAL. CIV. CODE § 3294 (West Supp. 1985). The trial court gave no instructions on the circumstances under which punitive damages could be awarded for oppression or fraud, but limited itself to malice as a basis for exemplary damages. 60 Cal. Rptr. at 415.

establish malice by showing that the defendant's wrongful conduct was willful, intentional, or done with reckless disregard of its possible results. The court found that Richardson-Merrell had acted recklessly and in wanton disregard of possible harm to others in "promoting, selling, and maintaining MER/29 on the market in view of its knowledge of the toxic effect of the drug."[67] This conduct, in the court's view, sufficiently supported a finding of malice.

B. The Second-Generation Cases

In the decade following *Roginsky* and *Toole*, the punitive damages issue arose sporadically. Although there were some dissenters,[68] most courts accepted the reasoning of the *Toole* decision.[69] Beginning with *Sturm, Ruger & Co. v. Day*,[70] decided by the Alaska Supreme Court in 1979, the practice of awarding punitive damages in defective product cases gained increasing momentum.[71]

Sturm was the first case since *Roginsky* and *Toole* to give serious attention to the policies involved in awarding punitive

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[67] 60 Cal. Rptr. at 416. The court's attention was called to the *Roginsky* case. Nevertheless, the court expressly declined to accept the *Roginsky* court's conclusion that wrongdoing on the part of corporate officers was not serious enough to impute the existence of malice to Richardson-Merrell. *Id.* at 416-17 n.3.

[68] *See* Kritser v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1973); Commercial Union Ins. Co. v. Upjohn Co., 409 F. Supp. 453 (W.D. La. 1976); Walbrun v. Berkel, Inc., 433 F. Supp. 384 (E.D. Wis. 1976).

[69] *See, e.g.*, Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976); Johnson v. Husky Indus., Inc., 536 F.2d 645 (6th Cir. 1976); Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Hoffman v. Sterling Drug, Inc., 485 F.2d 132 (3d Cir. 1973); Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976); Vollert v. Summa Corp., 389 F. Supp. 1348 (D. Hawaii 1975); Drake v. Wham-O Mfg., 373 F. Supp. 608 (E.D. Wis. 1974); Sabich v. Outboard Marine Corp., 131 Cal. Rptr. 703 (Cal. Ct. App. 1976); G.D. Searle & Co. v. Superior Ct. City of Sacramento, 122 Cal. Rptr. 218 (Cal. Ct. App. 1975); Pease v. Beech Aircraft Corp., 113 Cal. Rptr. 416 (Cal. Ct. App. 1974); Barth v. B.F. Goodrich Tire Co., 71 Cal. Rptr. 306 (Cal. Ct. App. 1968); Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. Ct. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978).

[70] 594 P.2d 38 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980), *cert. denied*, 454 U.S. 894 (1981).

[71] Much of this renewed interest in punitive damages was due to the publication of Professor Owen's seminal article on the subject. *See* Owen, *supra* note 33. Most of the courts that allowed punitive damages in products liability cases relied heavily on Professor Owen's analysis.

damages in products liability cases. In *Sturm* the plaintiff was shot and injured when the .41 magnum single-action revolver slipped out of his hands as he was unloading it. The manufacturer's instructions included a warning that the firearm could discharge while the hammer was located in any of the four positions, including the safety and loading positions.[72] The plaintiff, however, maintained that the revolver was defectively designed and the warning was not sufficient to relieve the defendant from liability. Accordingly, the plaintiff sued the manufacturer under strict liability in tort and sought punitive damages. The jury returned a verdict for the plaintiff, awarding $137,750 in compensatory damages and $2,895,000 in punitive damages.[73]

The defendant argued that punitive damages were incompatible with the "no-fault" underpinnings of strict liability. The Alaska Supreme Court, however, responded that punitive damages are designed not only to punish, but also to deter similar wrongdoing in the future. In the court's opinion, punitive damages served a deterrence function in cases where the product caused numerous minor injuries and in cases where it was cheaper for the manufacturer to pay compensatory damages than to remedy the product's defective condition. Furthermore, punitive damage awards in products liability actions would prevent a reckless manufacturer from gaining an unfair commercial advantage over its more socially responsible competitors.[74] In this manner, therefore, punitive damage awards promoted the same objectives in products liability cases as strict liability in tort. Thus, the court upheld the punitive damages award.[75]

The Wisconsin Supreme Court, in a lengthy opinion, also thoroughly evaluated the benefits and disadvantages of allowing plaintiffs to seek punitive damages in products liability actions. In a landmark decision, *Wangen v. Ford Motor Co.*,[76] the Wisconsin court opted in favor of punitive damages.

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[72] The warning stated in part: "The loading notch and the safety notch provide only partial security. If these notches are damaged, as they may be by 'fanning,' they offer no security. Never depend on this or any other mechanical safety device to justify pointing the firearm at any person." 594 P.2d at 41.

[73] *Id.*

[74] *Id.* at 47.

[75] *Id.* at 46-47. The Alaska Supreme Court reduced the award to $250,000 but, on rehearing, modified its earlier ruling and raised the award to $500,000. 615 P.2d at 624.

[76] 294 N.W.2d 437 (Wis. 1980).

The plaintiffs in *Wangen* were occupants of a 1967 Ford Mustang who were either killed or severely injured[77] when the fuel tank of their automobile ruptured and burst into flames after being struck in the rear by another vehicle. The plaintiffs sought both compensatory and punitive damages. The trial court denied Ford's motion to dismiss the punitive damages claims and an interlocutory appeal was taken. The intermediate appellate court held that punitive damages could be recovered, at least in some instances, in a products liability action based on strict liability in tort.[78]

On appeal to the Wisconsin Supreme Court, Ford maintained that punitive damages were antithetical to the theories of negligence and strict liability because such damages were appropriate only when the defendant was guilty of intentional wrongdoing. The court, however, determined that punitive damages were not contingent upon the classification of the underlying tort for which compensatory damages were sought; rather a punitive damages claim was justified if supported by proof of aggravating circumstances beyond those supporting compensatory damages. Furthermore, proof of an intentional desire to injure, vex, or annoy was not necessary as long as the injured party could show that the wrongdoer acted with reckless indifference or disregard for others' rights.[79]

The defendant also contended that punitive damages were unnecessary in products liability cases to effect punishment and deterrence objectives. According to Ford, compensatory damages

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[77] The driver, Robin DuVall, and her sister, Terri Wangen, were injured. Robin's brother, Kip Wangen, and Robin's son, Christopher DuVall, died as a result of their injuries. *Id.* at 440.

[78] The court of appeals concluded:

> (1) punitive damages are recoverable in a products liability suit for compensatory damages predicated on strict liability in tort; (2) punitive damages are not recoverable in a product liability suit for compensatory damages predicated on negligence; (3) punitive damages are recoverable in an action which survives the death of the injured person; (4) punitive damages are not recoverable in a wrongful death action; and (5) punitive damages are recoverable by parents in an action for damages for loss of society and companionship of a child but not in an action for damages for loss of the minor's earning capacity and medical expenses.

Id. at 441.

[79] *Id.* at 441-42.

were a substantial punishment and thus sufficient to deter manufacturers from marketing defective products.[80] In addition, Ford argued that punitive damages would not punish or deter wrongdoing because the public, not the manufacturer, would ultimately pay the damages through higher prices for goods.[81]

The Wisconsin court rejected each of these contentions. In the court's view, compensatory damages were not always sufficient to discourage the defendant manufacturer from further wrongdoing because "[s]ome may think it cheaper to pay damages or a forfeiture than to change a business practice."[82] The court was likewise skeptical that federal product quality regulations obviated the need for additional sanctions.[83] Finally, while admitting that compensatory damages would normally be passed on to consumers, the court doubted that manufacturers could pass on punitive damage awards quite so easily.[84]

Ford also alleged that allowing plaintiffs to recover punitive damages in product liability actions would have undesirable economic and social consequences. According to Ford, if punitive damages were not passed on to the consumer, innocent shareholders would bear the burden.[85] Moreover, since there would be a practical limit to the amount of punitive damages a manufacturer could pay, the injured parties who brought suit first would reap "the bonanza of punitive damages" while later victims would receive little or nothing.[86] Finally, echoing the concerns of the *Roginsky* court, Ford maintained that large claims for punitive damages could cause financial ruin for a manufacturer responsible for a single defect appearing in many products.[87]

Again, after considering each of these arguments, the court concluded that punitive damages were not contrary to public

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[80] *Id.* at 451.

[81] *Id.* at 452.

[82] *Id.* at 451.

[83] *Id.* at 451-52. Moreover, the court observed, even if Ford had such data it would be more relevant in persuading the fact-finder at the trial level not to impose punitive damages in a particular case rather than as an argument against the allowance of punitive damages generally in products liability cases. *Id.* at 452.

[84] *Id.*

[85] *Id.* at 453.

[86] *Id.* at 454.

[87] *Id.* at 455.

policy. The court observed that loss of investment was a risk that shareholders knowingly undertook. Moreover, the court held that the prospect of punitive damage awards might encourage shareholders and corporate management to exercise closer control over company operations.[88] The court responded to the "windfall" argument by declaring that such awards compensate effort required of the early plaintiffs to uncover and prove misconduct.[89] Finally, the court expressed doubts about Ford's claim that multiple punitive damage awards would bankrupt manufacturers. According to the court, trial courts could exercise control over jury verdicts to prevent undue punishment of defendants.[90]

Finding punitive damages appropriate in a products liability action, the court then considered whether allegations in the complaint, if proved, were sufficient to establish conduct that was willful and wanton, and in reckless disregard of the plaintiff's rights.[91] According to the complaint, "Ford knew of the defects in the design of the gas tank and filler neck and in the lack of a barrier betweeen the gas tank and passenger compartment of the 1967 Mustang."[92] Because of tests conducted by it as early as 1964, Ford also was aware of the fire hazard associated with the design. Moreover, years before the plaintiff's accident, Ford knew that design defects were causing serious burn injuries to occupants of Mustang automobiles. Ford could have corrected these defects. Nevertheless, to avoid bad publicity and the costs of recall and repair, Ford deliberately chose not to recall its 1967 Mustangs or issue public warnings of the defects.[93] These actions, according to the court, were sufficient to support a claim for punitive damages.[94]

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[88] *Id.* at 453-54.

[89] *Id.* at 454.

[90] *Id.* at 455-57. The court also pointed out that the plaintiff must prove "to a reasonable certainty by evidence that is clear, satisfactory and convincing" that punitive damages are warranted. *Id.* at 457. In addition, the court declared that excessive multiple punitive damages awards can be avoided because the jury, in considering the defendant's wealth, may take account of compensatory and punitive damages, along with fines and forfeitures, already imposed on the defendant or likely to be imposed on him. *Id.* at 459-60.

[91] *Id.* at 462.

[92] *Id.*

[93] *Id.*

[94] *Id.*

Shortly after the *Wangen* decision, the Minnesota Supreme Court also upheld a punitive damage award. In *Gryc v. Dayton-Hudson Corp.*,[95] a four-year-old child was severely burned when her pajamas came into contact with a lighted electric stove burner.[96] The pajamas were made of cotton flannelette manufactured by a defendant in the suit, Riegel Textile Corp.[97] The cotton fabric was not treated with a flame retardant, nor was any warning provided about its highly flammable characteristics.[98] The plaintiff sought compensatory damages on the theory that the fabric was unreasonably dangerous. The plaintiff also claimed punitive damages on the basis that Riegel had acted maliciously, willfully, or wantonly. The jury awarded the plaintiff $750,000 in compensatory damages and $1 million in punitive damages.[99] This award was affirmed on appeal.[100]

According to the court, manufacturers, through "design, testing, inspection and collection of data on product safety performance in the field," had exclusive control over the means of discovering and correcting product hazards.[101] Punitive damages offered a means of punishing those manufacturers who abused their control over safety information and marketed defective products in flagrant disregard for the public safety. Punitive awards also deterred others from acting with similar disregard for the public welfare.[102]

The trial court listed a number of factors for the jury to consider in determining whether Riegel had acted in "willful or reckless

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[95] 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

[96] *Id.* at 729. The plaintiff, Lee Ann Gryc, suffered severe second and third degree burns on twenty percent of her body. Although she underwent a series of painful skin grafting procedures, the burns caused permanent scarring and disfigurement. The testimony at trial also indicated that this permanent disfigurement could adversely affect Lee Ann's psychological makeup and impair her employment and matrimonial opportunities. *Id.* at 743-44.

[97] Suit was brought against Riegel Textile Corp., the manufacturer of the cotton fabric, Style Undies, Inc., the manufacturer of the pajamas, Associated Merchandising Corporation, the wholesale distributor, and Dayton-Hudson Corporation, the retail seller. The other defendants, excluding Riegel, settled with the plaintiffs prior to trial. *Id.* at 742 n.8.

[98] *Id.* at 729-30.

[99] *Id.* at 729.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 732-33.

disregard of the plaintiff's rights."[103] These factors included the magnitude of the danger, the feasibility of reducing the hazard, and the defendant's knowledge of the risk.[104] The appellate court approved these factors, concluding that there was sufficient evidence of misconduct by Riegel to justify a punitive damages award.[105]

Perhaps the most dramatic products liability case of the decade was *Grimshaw v. Ford Motor Co.*,[106] decided by the California Supreme Court in 1981. In *Grimshaw*, a 1972 Ford Pinto Hatchback, which had stalled on a freeway, erupted into flames when it was rear-ended by another vehicle. Lilly Gray, driver of the Pinto, suffered fatal burns and thirteen-year-old Richard Grimshaw, a passenger, suffered severe and permanently disfiguring burns on his entire body. Grimshaw and the heirs of Gray sued Ford Motor Co. and others.[107] Grimshaw's case was submitted to the jury on theories of negligence and strict liability, while Gray's case went to the jury only on a strict liability theory. The jury awarded Grimshaw $2,516,000 compensatory damages and over $125 million punitive damages; the Grays received a $559,680 compensatory award.[108] On Ford's motion for a new trial, the court required Grimshaw to remit all but $3.5 million of the punitive award as a condition of denial of the motion. Ford did not contest the compensatory damage

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[103] *Id.* at 739.

[104] Other factors listed by the trial court included:

> [1] [t]he manufacturer's awareness of the danger, the magnitude of the danger, and the availability of a reasonable remedy; [2] [t]he nature and duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or reduce the danger; [3] [t]he extent to which the manufacturer purposefully created the danger; [4] [t]he extent to which the defendants are subject to federal safety regulation; [5] [t]he probability that compensatory damages might be awarded against the defendant in other cases; and [6] [t]he amount of time which has passed since the actions sought to be deterred.

Id.

[105] *Id.*

[106] 174 Cal. Rptr. 348 (Cal. 1981).

[107] "The plaintiffs settled with the other defendants before and during trial; the case went to verdict only against Ford." *Id.* at 363 n.3.

[108] The trial court refused to allow the Grays to amend their complaint to seek punitive damages because punitive damages were not permitted by California's wrongful death statute. *Id.* at 363. The trial court's ruling was upheld on appeal. *Id.* at 392-99.

awards but contended on appeal that the punitive award was statutorily unauthorized and unconstitutional. In addition, Ford insisted that the evidence did not support a finding of malice or corporate responsibility for malice.[109]

At the time of the accident, the six-month-old Pinto had been driven approximately 3,000 miles. Apparently, the impact of the other car propelled the Pinto's gas tank forward, where it was punctured by a bolt on the differential housing, causing the punctured tank to spray fuel into the passenger compartment.[110]

Evidence at trial showed that crash tests performed by Ford on prototypes and production models revealed the risk of fire from rear-end collisions.[111] Ford executive officers knew of these crash test results but nevertheless proceeded with production.[112] The plaintiff also showed that Ford could have alleviated the Pinto explosion risk at relatively small cost.[113]

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[109] *Id.* at 358-59.

[110] *Id.* at 359. At the time the Pinto was designed, the accepted practice was to place the gas tank over the rear axle in subcompacts because small vehicles had less "crush space" between the rear axle and the bumper than larger cars. The Pinto's styling, however, required the tank to be placed behind the rear axle, leaving only nine or ten inches of crush space—far less than in any other American automobile or Ford overseas subcompact. In addition, the Pinto's bumper was little more than a chrome strip, less substantial than the bumper of any other American car then being produced. The Pinto's rear structure also lacked reinforcing members known as "hat sections" and horizontal cross-members running between them such as were found in cars of larger unitized construction. The absence of these reinforcing members rendered the Pinto less crash resistant than other vehicles. Finally, the Pinto's differential housing had an exposed flange and a line of exposed bolt heads. These protrusions were sufficient to puncture a gas tank driven forward against the differential upon rear impact. *Id.*

[111] *See id.* Ford also tested the Pinto as designed to determine whether it would meet a proposed federal safety regulation. The regulation required that all automobiles manufactured in 1972 be designed to withstand a twenty-mile-per-hour crash without significant fuel spillage. *Id.*

[112] *Id.* at 361.

[113] *Id.*

> Equipping the car with a reinforced rear structure, smooth axle, improved bumper and additional crush space at an additional cost of $15.30 [per vehicle] would have made the fuel tank safe in a 34 to 38-mile-per-hour rear end collision. If, in addition to the foregoing, a bladder or tank within a tank were used or if the tank were protected with a shield, it would have been safe in a 40 to 45-mile-per-hour rear impact. [The cost of these additional precautions ranged from $4.00 to $8.00 per vehicle. Furthermore,] [i]f the tank had been located over the rear axle it would have been

Because California had codified the doctrine of punitive damages in its Civil Code,[114] Ford attacked the validity of the statute rather than questioning the concept of exemplary damages itself. Nevertheless, the court rejected Ford's contention that its due process rights were violated because it did not have "fair warning" that its conduct would result in punitive damages liability under this statutory provision.[115] Ford also argued that "malice" as used in the California Civil Code required *animus malus*, or evil motive—an intention to injure the person harmed—and that the term was, therefore, conceptually incompatible with a non-intentional tort such as the manufacture and marketing of a defectively designed product.[116] The court, however, responded that "malice" in California included not only a malicious intention to injure the specific person harmed, but conduct demonstrating "a conscious disregard of the probability that the actor's conduct will result in injury to others."[117] The court declared this interpretation of the term "malice" in the products liability context to be consistent with the objectives of punitive damages. The court also observed that compensatory damages may not serve as a sufficient deterrent against wrongdoing because the manufacturer may find it more profitable to treat compensatory damages as a part of business costs instead of remedying the defect.[118]

Finally, Ford maintained that the punitive damages award, many times over the highest award for such damages ever upheld in California, was excessive. The court responded that the bench mark was not the size of other punitive awards[119] but the "degree of reprehensibility of the defendant's conduct, the wealth of the defendant, the amount of compensatory damages, and an amount

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safe in a rear impact at 50 miles per hour or more.

Id.

[114] CAL. CIV. CODE § 3294 (West 1970). At the time of the trial this provision declared:

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Id.

[115] *See* 174 Cal. Rptr. at 383.

[116] *See id.* at 381.

[117] *Id.*

[118] *Id.* at 382

[119] *Id.* at 388.

which would serve as a deterrent effect on like conduct by the defendant and others who may be so inclined."[120] Applying the standard to Ford, the court held that Ford management had acted in an extremely reprehensible manner,[121] exhibiting a "conscious and callous disregard of public safety in order to maximize profits."[122] The size of the award was not considered excessive vis-a-vis Ford's net worth—$7.7 billion at the time of the trial with 1976 after-tax income of over $983 million.[123] Finally, the roughly 1.4-to-1 ratio of punitive to compensatory damages[124] supported the court's contention that the former were not out of line but still substantial enough to have the desired deterrent effect.[125] Accordingly, the trial court's award of compensatory and punitive damages to Grimshaw was affirmed.

The number of punitive damages claims against product manufacturers has escalated substantially in the four years since *Grimshaw*. Although a wide variety of products have been involved in the reported decisions,[126] some of the most significant

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[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 388-89.

[126] *See, e.g.*, Saupitty v. Yazoo Mfg. Co., 726 F.2d 657 (10th Cir. 1984) (lawn mower); Alley v. Gubser Dev. Co., 569 F. Supp. 36 (D. Colo. 1983) (mobile home); Gorman v. Saf-T-Mate, Inc., 513 F. Supp. 1028 (N.D. Ind. 1981) (motorboat); Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981) (hot water heater); Campus Sweater & Sportswear v. M.B. Kahn Const. Co., 515 F. Supp. 64 (D.S.C. 1979), *aff'd per curiam*, 644 F.2d 877 (4th Cir. 1981) (roof); Airco, Inc. v. Simmons First National Bank, 638 S.W.2d 660 (Ark. 1982) (artificial breathing machine); Forrest City Mach. Works, Inc. v. Aderhold, 616 S.W.2d 720 (Ark. 1981) (grain cart); Coale v. Dow Chemical Co., 701 P.2d 885 (Colo. Ct. App. 1985) (lice control product for cattle); Cloroben Chemical Corp. v. Comegys, 464 A.2d 887 (Del. 1983) (drain cleaner); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983) (airplane); Skil Corp. v. Lugsdin, 309 S.E.2d 921 (Ga. Ct. App. 1983) (circular saw); Beerman v. Toro Mfg. Corp., 615 P.2d 749 (Hawaii Ct. App. 1980) (lawn mower); Collins v. Interroyal Corp., 466 N.E.2d 1191 (Ill. App. Ct. 1984) (stool); Boddie v. Litton Unit Handling Systems, 455 N.E.2d 142 (Ill. App. Ct. 1983) (conveyer gear drive mechanism); Moore v. Remington Arms Co., 427 N.E.2d 608 (Ill. App. Ct. 1981) (shotgun shell); Baleno by Baleno v. Jacuzzi Research, Inc., 461 N.Y.S.2d 659 (N.Y. App. Div. 1983) (hot tub); Willis v. Floyd Brace Co., 309 S.E.2d 295 (S.C. App. 1983) (leg brace); Int'l Armament Corp. v. King, 686 S.W.2d 595 (Tex. 1985) (shotgun); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981) (football helmet); Walter v. Cessna Aircraft Co., 358 N.W.2d 816 (Wis. Ct. App. 1984) (airplane).

cases have involved motor vehicles,[127] pharmaceuticals,[128] and asbestos.[129]

Encouraged perhaps by the *Wangen* and *Grimshaw* decisions, a number of plaintiffs have sought punitive damages against the manufacturers of defective motor vehicles. Thus, in *American Motors Corp. (AMC) v. Ellis*,[130] a case reminiscent of *Wangen* and *Grimshaw*, a Florida appellate court reversed a directed verdict for the defendant on the punitive damages issue. The plaintiff was burned when a truck hit from behind his AMC Ambassador. The plaintiff alleged that the automobile's fuel system was defective because it was placed beneath the trunk

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[127] *See, e.g.*, Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983); Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981), *mod. on other grounds*, 670 F.2d 21 (5th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982); Martin v. Smith, 534 F. Supp. 804 (W.D.N.C. 1982); Maxey v. Freightliner Corp., 450 F. Supp. 955 (N.D. Tex. 1978), *aff'd.*, 623 F.2d 395 (5th Cir. 1980), *reh'g en banc granted*, 634 F.2d 1008 (5th Cir. 1980), *vacated*, 665 F.2d 1367 (5th Cir. 1982), *aff'd in part*, 722 F.2d 1238 (5th Cir.), *mod. on reh'g*, 727 F.2d 350 (5th Cir. 1984); Wolmer v. Chrysler Corp., 474 So.2d 834 (Fla. Dist. Ct. App. 1985); American Motors Corp. v. Ellis, 403 So. 2d 459 (Fla. Dist. Ct. App. 1981); Turney v. Ford Motor Co., 418 N.E.2d 1079 (Ill. App. Ct. 1981); Harley-Davidson Motor Co. v. Wisniewski, 437 A.2d 700 (Md. Ct. Spec. App. 1981); Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981); Ford Motor Co. v. Nowak, 638 S.W.2d 582 (Tex. Civ. App. 1982); Ford Motor Co. v. Bartholomew, 297 S.E.2d 675 (Va. 1982).

[128] *See, e.g.*, Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (C.D. Cal. 1983) (DES); Wolf *ex rel.* Wolf v. Proctor & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982) (tampon); *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); Hilliard v. A.H. Robins Co., 196 Cal. Rptr. 117 (1983) (IUD); Palmer v. A.H. Robins, 684 P.2d 187 (Colo. 1984) (IUD); Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038 (Kan. 1984) (birth control pill), *cert. denied*, 105 S.Ct. 365 (1984); Racer v. Utterman, 629 S.W.2d 387 (Mo. Ct. App. 1981) (flammable surgical tape), *cert. denied*, 459 U.S. 803 (1982). *But see* Magallanes v. Superior Court of Los Angeles County, 213 Cal. Rptr. 547 (1985) (punitive damages not allowed under market share liability theory).

[129] *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984); Hansen v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 1749 (1985); Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982); Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D.N.J. 1982); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (1985); Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. Dist. Ct. App. 1984); Froud v. Celotex Corp., 437 N.E.2d 910 (Ill. App. Ct. 1982), *rev'd*, 456 N.E.2d 131 (1983); Fischer v. Johns-Manville Corp., 472 A.2d 577 (N.J. Super. Ct. App. Div. 1984); Thiry v. Armstrong World Indus., 661 P.2d 515 (Okla. 1983).

[130] 403 So. 2d 459 (Fla. Dist. Ct. App. 1981).

floor rather than in the "kick-up" area above the rear axle.[131] The appellate court held that the plaintiff could recover punitive damages if he could show that the defendant's actions constituted "willfulness, recklessness, maliciousness, outrageous conduct, oppression or fraud."[132] According to the plaintiff, the defendant was aware of the risk of fire from its own crash tests, but to save money had refused to relocate the fuel tank, despite the recommendation of its own engineers.[133] The company did not correct the problem until required to do so by new government standards. Relying on *Wangen*, the court concluded that the plaintiff was entitled to a new trial.[134]

The injured parties also were allowed to put forth a claim for punitive damages in *Maxey v. Freightliner Corp.*,[135] another "second collision" case. In *Maxey*, the plaintiffs' parents died when a truck manufactured by the defendant overturned, slid 288 feet, and burst into flames. Apparently, when the truck overturned, the fuel tank punctured, allowing fuel to spill and ignite.[136] The plaintiffs claimed that the manufacturer had placed the fuel tanks close to ignition sources and occupants without also including impact absorbers and fuel line fittings that would separate in the event of a crash.[137] In addition, the defendant had not performed any crash tests on the fuel system or the truck, nor did it maintain any records on accident or safety experience.[138]

At the first trial, the jury awarded $150,000 compensatory and $10 million punitive damages.[139] The trial court, however, concluded that compliance with industry custom regarding the design of truck fuel systems precluded an award of punitive

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[131] *Id.* at 459. The "kick-up" area is the space above the rear axle and beneath the package shelf below the rear seat. *Id.*

[132] *Id.* at 467.

[133] *Id.*

[134] *Id.* at 469.

[135] 450 F. Supp. 955 (N.D. Tex. 1978), *aff'd*, 623 F.2d 395 (5th Cir.), *reh'g en banc granted*, 634 F.2d 1008 (5th Cir. 1980), *vacated*, 665 F.2d 1367 (5th Cir. 1982), *aff'd in part*, 722 F.2d 1238 (5th Cir.), *mod. on reh'g*, 727 F.2d 350 (5th Cir. 1984).

[136] 450 F. Supp. at 957.

[137] *Id.*

[138] *Id.* at 963.

[139] *Id.* at 958-59.

damages.[140] Therefore, it granted a judgment n.o.v. with respect to the punitive damage award. Initially, on appeal, the court held that punitive damages were proper under Texas law only if a "willful act, or omission, or gross neglect" were shown.[141] Evidence of even "some care" was sufficient to preclude a finding of "gross neglect."[142] Since under state law, compliance with industry custom was sufficient to constitute "some care,"[143] the trial court had not erred in dismissing the punitive damages claim.[144]

On rehearing, however, the appellate court changed its mind after learning that the Texas courts had abandoned the "some care" standard while *Maxey* was on appeal.[145] The new rule focused not on whether the defendant exercised "an entire want of care," but on whether his conduct raised an inference of conscious indifference.[146] Under this approach, compliance with industry custom was relevant, but not conclusive, on the issue of conscious indifference.[147] Accordingly, the court remanded the case to the trial court. The trial court, however, concluded that the evidence failed to demonstrate conscious indifference on the defendant's part and, therefore, reinstated its original judgment.[148] The trial court also declared that if the punitive damages award was reinstated on appeal, it would order a remittitur limiting the plaintiffs' recovery to three times the amount of the compensatory award.[149] The plaintiffs again appealed and the appellate court again reversed.[150] The court found ample evidence to support a conclusion that the manufacturer had behaved with conscious indifference to the safety of its consumers[151] and thus determined that punitive damages were

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[140] *Id.* at 966.
[141] 623 F.2d at 398.
[142] 665 F.2d at 1372.
[143] *See* Hernandez v. Smith, 552 F.2d 142 (5th Cir. 1977).
[144] 623 F.2d at 399
[145] 665 F.2d at 1373.
[146] Birk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981).
[147] *See* 665 F.2d at 1376.
[148] 722 F.2d at 1241.
[149] *Id.*
[150] *Id.* at 1238.
[151] *Id.* at 1241-42.

justified.[152] However, the appellate court upheld the trial court's ruling as to a remittitur.[153]

Crashworthiness also figured in *Leichtamer v. American Motors Corp.*,[154] decided by the Ohio Supreme Court in 1981.[155] The plaintiffs in *Leichtamer* were involved in an accident when the Jeep CJ-7 in which they were riding at an off-the-road recreation facility pitched over and crashed. The accident killed the driver, Vance, and his wife. Carl Leichtamer suffered a fractured skull, while his sister, Jeanne, was left a paraplegic as the result of her injuries. The plaintiffs admitted that Vance was driving negligently and that his conduct caused the vehicle to overturn. Nevertheless, the plaintiffs contended that improper placement of the Jeep's roll bar "substantially enhanced, intensified, aggravated, and prolonged" the injuries that they sustained from the accident.[156]

The jury returned a verdict for the plaintiffs. Compensatory damages of $100,000 and punitive damages of $100,000 were assessed on behalf of Carl Leichtamer, while Jeanne Leichtamer received $1 million in compensatory damages and $1 million in punitive damages.[157] The intermediate appellate court affirmed the punitive damage award because the manufacturer was aware of the risk of a forward pitch-over[158] yet failed to remedy the dangerous condition or warn the public about it. In addition, the defendant's advertising showed the vehicle engaging in various off-road maneuvers and implied that they could be done safely. According to the intermediate appellate court, the "incitement to reckless conduct"[159] depicted in the advertisements, coupled with the defendant's failure to reveal that the roll bar

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[152] *Id.*

[153] *Id.* at 1242. The court also affirmed the compensatory damages award and declared that a new trial only on the punitive damages claim would be necessary if the plaintiffs refused to agree to the remittitur. 727 F.2d at 351-52.

[154] 424 N.E.2d 568 (Ohio 1981).

[155] For other punitive damages cases involving the crashworthiness issue, see Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981), *mod. on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982); 534 F. Supp. 804.

[156] 424 N.E.2d at 572.

[157] *Id.* at 573.

[158] A pitch-over occurs when the vehicle turns end over end and lands upside down; a side roll occurs when the vehicle turns over on its side. *Id.* at 572.

[159] *Id.* at 579.

was not as safe as it appeared,[160] justified an inference of malice.

The Ohio Supreme Court declared that conduct manifesting a "flagrant indifference to the possibility that the product might expose consumers to unreasonable risks of harm" was sufficient to support an award of punitive damages.[161] The court felt that the representations in the manufacturer's advertisements were not enough by themselves to establish the requisite degree of malice. Nevertheless, the advertisements, in conjunction with other wrongful acts, were sufficient to meet the "flagrant indifference" standard and thus to justify a punitive award.[162] The court noted that the manufacturer had not only misrepresented the safety of its vehicles, but also had failed to perform any tests on the roll bar under pitch-over conditions. In the court's opinion, this additional misconduct was enough to warrant the punitive damage award.[163]

As mentioned earlier, a number of punitive damages cases involved pharmaceutical products. In two of these cases, women injured by the Dalkon Shield[164] intrauterine device (IUD) sought punitive damages against A.H. Robins, the manufacturer of the contraceptive device. In *Hilliard v. A.H. Robins Co.*,[165] the plaintiff sued to recover for personal injuries suffered in connection with her use of the Dalkon Shield.[166] In support of her

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[160] *Id.* at 580.

[161] *Id.* at 579.

[162] *Id.*

[163] *Id.* at 580.

[164] *See* Van Duke, *The Dalkon Shield: A Primer in IUD Liability*, 6 WEST. ST. U.L. REV. 1, 6-10 (1978). The Dalkon Shield is a small plastic device with a thin translucent plastic membrane attached to a plastic outer rim. This rim is serrated with fins on each side to hold the device in place in the uterine cavity. A four-inch nylon string is attached to the device. When the Dalkon Shield is in place, the string extends through the cervical canal. *Id.*

[165] 196 Cal. Rptr. 117 (Cal. Ct. App. 1983).

[166] *Id.* at 131-32. The plaintiff alleged that the Dalkon Shield was defective in three respects. First, because of the serrated edges, the IUD migrated and perforated through the wall of the plaintiff's uterus. Second, the IUD could not be readily discovered by physical means once it was out of the plaintiff's uterus and somewhere else in her pelvic cavity. Moreover, the device could not be discovered by ordinary X-ray techniques because of the low level radiopacity of the device. Third, the tail string attached to the Dalkon Shield was a major carrier of bodily fluids laden with bacteria from the vagina to the uterus and to other parts of the pelvic cavity if the IUD migrated or went through the walls of the uterus. *Id.*

claim for punitive damages, the plaintiff alleged that A.H. Robins, which had acquired the rights to the Dalkon Shield from its original developers, failed to test the product properly before placing it on the market.[167] In addition, the plaintiff maintained that the defendant received numerous complaints that the Dalkon Shield was causing pelvic inflammatory disease in women users, but did nothing to modify the product or warn prospective users of this risk.[168]

The lower court held a bifurcated trial. The jury returned a verdict of $600,000 on the compensatory claim, but the trial court granted a directed verdict for the defendant on the punitive damages issue.[169] This ruling was reversed on appeal, however.[170] According to the appellate court, the jury could have concluded that "the defendant acted with conscious disregard of the rights or safety of others, that it was aware of the probable dangerous consequences of its conduct, and that the defendant wilfully and deliberately failed to avoid these consequences."[171]

Palmer v. A.H. Robins Co.,[172] which also involved the Dalkon Shield, is a landmark Colorado Supreme Court decision. Not only was the punitive award at stake the largest yet upheld on appeal, but the court's opinion on the punitive damages issue was one of the most comprehensive since *Wangen*. The plaintiff in *Palmer*, a twenty-four-year-old woman, was fitted with a Dalkon Shield in January, 1973. Her physician specifically relied on the promotional claims made by the manufacturer as to the safety and effectiveness of the IUD.[173] Seven months later, however, she became pregnant. Believing that removal of the IUD might cause a spontaneous abortion, her physician decided to leave the device in place. Three months into her pregnancy Palmer suffered a spontaneous septic abortion caused by a blood borne bacterial infection centered in the uterine area. Due to a massive infection with a concomitant fall in blood pressure,

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[167] *Id.* at 125.
[168] *Id.* at 132.
[169] *Id.* at 123.
[170] *Id.*
[171] *Id.* at 132.
[172] 684 P.2d 187 (Colo. 1984).
[173] *Id.* at 196.

Palmer went into septic shock. She also developed a blood disorder impeding normal blood clotting. A total hysterectomy then was performed to save her life. Thereafter, the plaintiff experienced continuing health problems attributed to the hysterectomy.[174]

The evidence strongly indicated that the Dalkon Shield had caused the uterine infection, resulting in the plaintiff's septic abortion. Consequently, Palmer sued the IUD's manufacturer. After a lengthy trial, the jury returned a verdict in her favor for $600,000 compensatory and $6.2 million punitive damages.[175] As in the *Hilliard* case,[176] the plaintiff presented evidence that the manufacturer had marketed the Dalkon Shield without adequate testing[177] and had ignored reports of septic abortions and other injuries caused by the intrauterine device.[178]

The defendant claimed that the state statute which authorized punitive damages was unconstitutionally vague. The statute allowed the jury to award punitive damages where the defendant's conduct was "attended by circumstances of fraud" or where it constituted "a wanton and reckless disregard of the injured party's rights and feelings."[179] As the court observed, the test of vagueness is "whether the statute proscribes conduct in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application."[180] In this case, however, the court felt that the statutory terms "circumstances of fraud" and "wanton and reckless disregard" were

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[174] *Id.* at 197.

[175] *Id.*

[176] *See* notes 165-71 *supra* and accompanying text.

[177] 684 P.2d at 197. Dr. Hugh Davis, one of the inventors of the Dalkon Shield, conducted a test study for one year at a family planning clinic that he directed. After A.H. Robins acquired the rights to the Dalkon Shield it made several modifications to the device. A.H. Robins then began marketing the product without completing any clinical testing of the modified IUD. *Id.* at 195.

[178] *Id.* at 197. Dr. Thad J. Earl, a Robins clinical investigator and consultant, sent a letter to the company's management in June, 1972, in which he warned of the danger of septic abortion in shield users who might become pregnant. He cited five instances from his own experience where septic abortions had occurred when the IUD was left in pregnant patients. During the following seventeen months, Robins received twenty-two additional reports of spontaneous septic abortions in shield users, one of which resulted in death. *Id.* at 196.

[179] COLO. REV. STAT. § 13-21-102 (1973).

[180] 684 P.2d at 215.

well-established common law concepts and, therefore, were sufficiently clear to afford a practical guide for behavior.[181]

A.H. Robins also alleged that possible "punitive overkill" from multiple punitive damages awards gave rise to an unconstitutional application of the punitive damages statute. However, the court found no evidence to support the overkill theory:

> Robins' claim of "punitive overkill," when viewed in this light, takes on a speculative cast. The record is devoid of any evidentiary showing that Robins experienced such a number of past punitive damages verdicts as to render the award in this case so oppressive as to raise a colorable due process claim.[182]

The manufacturer also asserted that a punitive damage award was incompatible with a strict liability claim because the former is solely concerned with the conduct of the defendant, while the latter focuses on the condition of the product, regardless of fault. The court also rejected this argument by observing that strict liability primarily was oriented toward compensation, while the purpose of punitive damages was to punish wrongful conduct and to deter similar conduct in the future.[183]

Concluding that punitive damage awards were proper in products liability cases, the court then reviewed the jury verdict itself. First, the appellate court determined that the manufacturer's conduct met the statutory standard for punitive damages. As the court noted, Robins advertised its product as having a pregnancy rate of 1.1 percent when it knew that the actual rate was 5.5 percent.[184] As early as 1971 the manufacturer's quality control supervisor informed the company of the risk of uterine infection to users, yet A.H. Robins continued to describe the

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[181] *Id.* at 214-15.

[182] *Id.* at 216.

[183] *Id.* at 217-18.

[184] *Id.* at 218. A.H. Robins based its claim of a 1.1 percent pregnancy rate on the clinical experience reported by Dr. Davis, one of the inventors of the Dalkon Shield. Subsequently, two memoranda were sent to A.H. Robins' management by members of the company's medical department. The first memorandum indicated that Davis' claim of a 1.1 percent pregnancy rate in twelve months had jumped to the equivalent of a 5.5 percent pregnancy rate after fourteen months. A second memorandum again called attention to the higher pregnancy rates and stated that the Davis study was "not long enough . . . to project with confidence to the population as a whole." *Id.* at 195.

Dalkon Shield as "the modern superior" IUD, combining "minimal pregnancy rates with exceptional patient tolerance," preventing pregnancy "without producing any general effects on the body, blood or brain," and providing "safe, sure, sensible contraception."[185] Finally, one of its own consultants informed the defendant in June, 1972, of the danger of septic abortion, but A.H. Robins not only failed to warn physicians and users, but, as late as April, 1973, advised physicians to leave the shield in place if an unplanned pregnancy occurred.[186] This conduct, in the court's opinion, was sufficient to constitute "fraud" or "wanton and reckless disregard."[187]

The final issue addressed by the Colorado Supreme Court was the size of the punitive award. A.H. Robins contended that the $6.2 million verdict was "a product of passion and prejudice and thus excessive as a matter of law."[188] The court noted that, while a ten-to-one ratio of punitive to compensatory damages was high, higher ratios had been upheld where the purposes of a punitive damages award properly guided the jury in reaching its verdict.[189] According to the court, it was proper for the jury to consider in assessing the punitive award "the nature of the act which caused the injury, the economic status of the defendant, and the deterrent effect of the award on others."[190] The court noted, "Robins' marketing program occurred over a long period of time, was directed to a vast array of unwary consumers, and was accompanied by false claims of safety and a conscious disregard of life threatening hazards known by it to be associated with its product."[191] The court also observed that A.H. Robins had made a substantial profit from sales of the Dalkon Shield and that company earnings and net worth had increased significantly during the period that the IUD was on

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[185] *Id.* at 219.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 220.

[189] *Id. See also* Vossler v. Richards Mfg. Co., 192 Cal. Rptr. 219 (Cal. Ct. App. 1983) (20:1 ratio upheld); Mailloux v. Bradley, 643 P.2d 797 (Colo. Ct. App. 1982) (ratios of 10:1 and 34:1 upheld); Ettus v. Orkin Exterminating Co., 665 P.2d 730 (Kan. 1983) (24:1 ratio upheld).

[190] 684 P.2d at 220.

[191] *Id.*

the market.[192] Consequently, the court concluded, "The sum of $6,200,000 is neither grossly disproportionate to the amount of actual damages sustained by Palmer, nor, in light of Robins' financial condition, unconscionably oppressive."[193]

In *Wooderson v. Ortho Pharmaceutical Corp.*,[194] the plaintiff was awarded $2 million in compensatory damages and $2.75 million in punitive damages against the maker of Ortho-Novum, an oral contraceptive.[195] The plaintiff suffered kidney failure and other injuries as a result of taking Ortho-Novum 1/80 from 1972 until 1976.[196] A British study[197] had revealed the danger of hemolytic uremic syndrome (HUS) from high estrogen levels as early as 1969.[198] The Food and Drug Administration had sent letters in 1970 to physicians advising them of the British study findings, yet the manufacturer failed to warn of the danger until January, 1977.[199] The defendant argued that the submission of the punitive damages claim to the jury prejudiced the compensatory damages issue.[200] The Kansas Supreme Court, however, concluded that the manufacturer had a duty to warn once it became aware of the danger[201] and upheld the punitive damage award.[202]

At least eight cases have dealt with the question of punitive damages in the context of asbestos.[203] *Fischer v. Johns-Manville*

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[192] *Id.* The defendant's net worth nearly doubled during the period when the Dalkon Shield was marketed, reaching $158 million in 1974. During this period, the company's annual net earnings ranged from $19 million to $27 million. In 1978, the year before the trial, A.H. Robins earned almost $30 million and its net worth increased to $240 million. *Id.* at 220-21.

[193] *Id.* at 221.

[194] 681 P.2d 1038 (Kan.), *cert. denied*, 105 S.Ct. 365 (1984).

[195] *Id.* at 1042.

[196] *Id.* at 1045.

[197] *Id.* at 1062-63.

[198] Hemolytic uremic syndrome (HUS) involves malignant hypertension, vessel wall damage, and acute kidney failure. *Id.* at 1062.

[199] *Id.*

[200] *Id.* at 1064.

[201] *Id.* at 1057.

[202] *Id.* at 1042.

[203] *See* 734 F.2d 1036; 727 F.2d 506; 691 F.2d 811; 548 F. Supp. 357; 553 F. Supp. 482; 437 N.E.2d 910; 472 A.2d 577; 611 P.2d 515. For additional information on the problem of compensating asbestos victims, see Phillips, *Asbestos Litigation: The Test of the Tort System*, 36 ARK. L. REV. 343 (1982); Special Project, *An Analysis of the*

Corp.[204] is illustrative. The plaintiff in *Fischer* worked for Bell Asbestos Mines, Ltd. from 1938 until 1942 and for an additional four-month period in 1945. Despite job duties requiring the plaintiff to handle asbestos on a regular basis, his employer never provided him with any protective clothing, safety apparatus, cautionary warning, or instructions on how to handle the product safely.[205] After leaving Bell in 1945, the plaintiff never again was exposed to asbestos or other substances deleterious to the lungs. Nevertheless, in 1977 he began to exhibit symptoms of pulmonary disease linked to asbestos exposure.[206] By 1980 this had led to permanent disability.[207] The plaintiff then brought suit against Bell, his former employer, as well as Johns-Manville and another asbestos supplier.[208] At trial, the jury awarded the plaintiff both compensatory and punitive damages against Bell as well as asbestos supplier Johns-Manville.[209]

The plaintiff based his punitive damages claim on the contention that the defendants knew of the hazards associated with exposure to asbestos as early as the 1930's and had made a conscious decision to withhold this information from the public. This conduct, according to the plaintiff, constituted an outrageous and flagrant disregard of the substantial health risks to which the defendants subjected the public and, therefore, justified the imposition of punitive damages.[210]

Legal, Social and Political Issues Raised by Asbestos Litigation, 36 VAND. L. REV. 573 (1983); Note, *Examination of Recurring Issues in Asbestos Litigation*, 46 ALB. L. REV. 1307 (1982) [hereinafter cited as Note, *Asbestos Litigation*]; Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983) [hereinafter cited as Note, *The Manville Bankruptcy*]; Note, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871 (1983) [hereinafter cited as Note, *Issues in Asbestos*]. Note, *Asbestos Litigation*, 10 OKLA. CITY U. L. REV. 393 (1985).

[204] 472 A.2d 577 (N.J. 1984).

[205] *Id.* at 579.

[206] *Id.*

[207] *Id.*

[208] *Id.* The claim against the Celotex Corporation, the other asbestos supplier, was dismissed at the close of the plaintiff's case. *Id.*

[209] *Id.* The jury awarded compensatory damages of $86,000 on the basis of 20 percent against Bell and 80 percent against Johns-Manville. The plaintiff's wife also recovered $5,000 in compensatory damages on the same basis. In addition, the jury awarded Fischer $240,000 punitive damages against Johns-Manville and $60,000 against Bell. *Id.*

[210] *Id.* at 580.

On appeal, neither Johns-Manville nor Bell challenged the amount of the punitive award as such or the trial court jury instructions. Instead, the defendants argued that punitive damages should not be allowed at all in products liability cases. They also contended that their actions were not sufficiently culpable to meet the necessary standard of outrageous conduct in deliberate disregard of the rights of others.[211] The New Jersey appellate court disagreed with these contentions, however, and upheld the punitive damages award.[212]

In response to the argument that punitive damages were inappropriate in cases where compensatory damages were recovered on a strict liability basis, the court surveyed decisions from other states and concluded that the overwhelming majority had found no difficulty in adapting the concept of punitive damages to strict liability situations.[213] According to the court,[214] the only dissenting view was the New Jersey federal district court in *Gold v. Johns-Manville Sales Corp.*[215] Relying on the reasoning of the California court in *Grimshaw*, the New Jersey court in *Fischer* declared that punitive damages were consistent with the policies supporting strict products liability and were necessary to punish manufacturers who disregarded public safety and to deter them from continuing to act in such a manner.[216] In the court's words: "Both punishment and deterrence are appropriate responses to a supplier of defective goods who has knowledge of the high degree of risk of grave harm to which they will subject the public but who nevertheless makes the cynical, conscious business decision to place and keep them on the market."[217] The court also rejected the contention that allowance of punitive damages in mass injury cases would lead to bankruptcy. It agreed with *Grimshaw*, *Gryc*, and *Wangen* that predictions of wholesale insolvency caused by punitive awards were greatly exaggerated and observed that exposure to liability for compen-

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[211] *Id.* at 581.

[212] *Id.* at 579.

[213] *Id.* at 581-83.

[214] *Id.* at 583.

[215] 553 F. Supp. 482 (D.N.J. 1982). *Accord* Wolf v. Proctor & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982).

[216] 472 A.2d at 584.

[217] *Id.*

satory damages[218] largely caused Johns-Manville's financial difficulties.

The court also concluded that the defendant's conduct met the standard of egregiousness properly underlying a punitive award.[219] As the court observed, a considerable amount of evidence presented at trial showed that the manufacturers of asbestos were aware of pulmonary risks. For example, eleven scientific articles published between 1936 and 1941 documented the grave pulmonary hazards of exposure to asbestos and discussed measures to protect workers.[220] Moreover, asbestos workers had made claims against Johns-Manville as early as 1933.[221] The court also referred to the Sumner Simpson correspondence.[222] The papers showed that Johns-Manville and other asbsestos suppliers not only failed to warn of the risks of asbestos exposure, but took affirmative steps to prevent this information from reaching workers, consumers, and the general public.[223] The court noted that the plaintiff's employer, Bell, also was aware of the danger of exposure to asbestos, but failed to warn its employees of the risk.[224]

Jackson v. Johns-Manville Sales Corp.,[225] in contrast to most of the other asbestos cases, resisted the trend toward awarding punitive damages. In *Jackson*, a former shipyard worker brought an action seeking both compensatory and punitive damages against various manufacturers and sellers of asbestos products. At trial, the jury awarded the plaintiff $391,500 in compensatory damages. Punitive awards of $500,000 and $125,000 respectively were returned against asbestos suppliers Johns-Manville and

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[218] *Id.* at 586.

[219] *Id.* at 588.

[220] *Id.* at 580.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 580-81. Sumner Simpson was the president of Raybestos, an asbestos supplier, during the 1930's. In 1935, and later in 1941, he attempted to prevent publication in the trade periodical *Asbestos* of articles relating to asbestosis. Simpson informed Vandiver Brown, the secretary of Johns-Manville, of his intention and on each occasion received Brown's support. *Id.* The Sumner Simpson papers are also discussed in 734 F.2d at 1039-40 and in 727 F.2d at 530. The papers are reproduced in an appendix to the *Jackson* opinion. 727 F.2d at 532-33.

[224] 472 A.2d at 587-88.

[225] 727 F.2d 506 (5th Cir. 1984).

Raybestos.[226] On appeal, the federal circuit court acknowledged that the defendants were guilty of culpable conduct, but concluded that the basic policy objectives of punitive damages were satisfied in this case by the defendants' multiple exposure to liability for compensatory damages.[227]

The court obviously was skeptical about the deterrent effect of punitive damages in a case where overall compensatory liability was extensive.

> The significance of punitive damages as a deterrent depends on the size of the penalty increase relative to the "base penalty" exacted by strict liability compensatory awards. . . . Because of the dimensionless character of the prospects for future litigation in this instance, the "base penalty" for all practical purposes, is illimitable. Correspondingly, the significance of punitive damages as a deterrent diminishes to the vanishing point.[228]

The prospect of "overkill" also concerned the appellate court. The court believed that payment of prior punitive damages claims might consume the defendants' resources, thus depriving future claimants of compensation.[229] Although acknowledging that a bankruptcy court could give future compensatory damage claims priority over earlier punitive damage claims, the *Jackson* court declared that the existence of multiple punitive awards "would only complicate the already formidable problems of devising a bankruptcy reorganization plan that would make adequate provision for future claimants."[230] The *Jackson* decision is one of the first since *Roginsky*[231] to give serious thought to the overkill problem. It remains uncertain whether *Jackson* represents a change in judicial attitude, however. The court did not suggest that punitive damages were inherently unsuitable in products liability cases,[232] and the plight of the asbestos industry created a special situation not shared by other product manufacturers.

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[226] *Id.* at 511.
[227] *Id.* at 525-26.
[228] *Id.* at 527.
[229] *Id.* at 526.
[230] *Id.* at 528.
[231] Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832.
[232] 727 F.2d at 529.

For the most part, the cases discussed above are illustrative of the growing trend toward allowing plaintiffs in products liability actions to seek punitive damages. Of the many courts that have considered this question since *Roginsky* and *Toole*[233] were decided in 1967, only a few have rejected the idea of punitive damages in such cases.[234] In contrast, the vast majority of states now appear to have accepted the principle of punitive damages in products liability litigation.[235] Product manufacturers, of course, have strongly objected to the introduction of punitive damages into the products liability area, and while a number of courts have considered their arguments, very few have found them persuasive. Nevertheless, some of the concerns expressed by product manufacturers are indeed legitimate. These issues are discussed below.

II. THE SOCIAL FUNCTIONS OF PUNITIVE DAMAGES

Courts and legal scholars have offered a variety of rationales to explain the practice of awarding punitive damages in civil

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[233] Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398.

[234] *See, e.g.*, 553 F. Supp. 482; 555 F. Supp. 613; 550 F. Supp. 692; Phillippe v. Browning Arms Co., 375 So. 2d 151 (La. Ct. App. 1979), *aff'd*, 395 So. 2d 310 (La. 1980). A federal appeals court, applying Mississippi law, also refused to allow punitive damages in *Jackson v. Johns-Manville Sales Corp.*, but did not foreclose the imposition of such damages in other situations.

[235] *See, e.g.*, 734 F.2d 1036 (Texas law); Saupitty v. Yazoo Mfg. Co., 726 F.2d 657 (10th Cir, 1984) (Oklahoma law); Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983) (Virgin Islands law); 691 F.2d 811; D'Hedouville v. Pioneer Hotel Co., 552 F.2d 886 (9th Cir. 1977) (Arizona law); 546 F.2d 993; Johnson v. Husky Industries, 536 F.2d 645 (6th Cir. 1976) (Tennessee law); 485 F.2d 132 (Pennsylvania law); 573 F. Supp. 1324; 569 F. Supp. 36; 548 F. Supp. 357; 513 F. Supp. 1028; 534 F. Supp. 804; 515 F. Supp. 64, *aff'd per curiam*, 644 F.2d 877; LeBlanc v. Spector, 378 F. Supp. 301 (D. Conn. 1973); Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976) (punitive damages in wrongful death products liability action); 594 P.2d 38, *mod. on reh'g*, 615 P.2d 621, *cert. denied*, 454 U.S. 894 (1981); 196 Cal. Rptr. 117; 174 Cal. Rptr. 348; 60 Cal. Rptr. 398; 661 P.2d 515; 681 P.2d 1038; 297 S.E.2d 675; 294 N.W.2d 437; 616 S.W.2d 720; 403 So. 2d 459; 426 So. 2d 1108; 309 S.E.2d 921; 615 P.2d 749; 253 N.E.2d 636; 418 N.E.2d 1079; 427 N.E.2d 608; 437 N.E.2d 910; 309 S.E.2d 295; Cantrell v. Amarillo Hardware Co., 602 P.2d 1326 (Kan. 1979); American Laundry Mach. Indus. v. Horan, 412 A.2d 407 (Md. Ct. Spec. App. 1980); 437 A.2d 700; 297 N.W.2d 727; Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978); Racer v. Utterman, 629 S.W.2d 387 (Mo. Ct. App. 1981), *cert. denied*, 459 U.S. 803 (1982); Leslie v. Jones Chemical Co., 551 P.2d 234 (Nev. 1976); 472 A.2d 577; 461 N.Y.S.2d 659; 638 S.W.2d 660; 464 A.2d 887; Wussow v. Commercial Mechanisms, Inc., 293 N.W.2d 897 (Wis. 1980); 638 S.W.2d 582; 619 S.W.2d 435; 424 N.E.2d 568; 684 P.2d 187; CONN. GEN. STAT. ANN. § 52-240(b) (West Supp. 1983); MINN. STAT. ANN. § 549.20 (West Supp. 1983); OR. REV. STAT. § 30.925 (1981).

cases. Foremost among these justifications are punishment and deterrence,[236] but compensation and law enforcement also sometimes are suggested as additional, though subsidiary, social functions of exemplary damages.[237] In this section of the Article each of these functions will be examined to determine if any provide a rationale for allowing assessment of punitive awards against product manufacturers.

A. The Retributive Function

Courts have almost universally accepted punishment as one of the principal functions of punitive damages.[238] Strictly speaking, however, punishment is not an end in itself but rather a means of achieving social goals such as retribution, rehabilitation, and deterrence.[239] Therefore, it is better to use the term "retribution" instead of "punishment" to distinguish between the vindictive function of punitive damages and deterrence or other utilitarian objectives. Retribution in this context means the imposition of a sanction or detriment upon one who has committed a wrongful act.[240]

Some commentators have offered retribution as a rationale for awarding punitive damages in products liability cases.[241] Punitive damage awards are applauded as a means of restoring the injured party's peace of mind[242] and of expressing public outrage at the nature of the manufacturer's conduct.[243] In addition, punishment of corporate misbehavior is said to reaffirm the notion that business enterprises must observe the same social norms as individuals.[244] For this reason, it is appropriate to

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[236] *See* notes 238-459, 486-591 *infra* and accompanying text.

[237] *See* notes 460-85 *infra* and accompanying text.

[238] *See, e.g.*, Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851); Hays v. Houston G.N.R.R., 46 Tex. 272, 280 (1876); Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 258 (1985). Note, *supra* note 1, at 433.

[239] *See* Peters, *supra* note 3, at 376 n.50.

[240] According to the retributive view of justice, punishment is justified because the wrongdoer deserves punishment. *See* Rawls, *Two Concepts of Rules*, in THE PHILOSOPHY OF PUNISHMENT 105, 107 (H. Acton ed. 1969).

[241] *See, e.g.*, Comment, *Exemplary Damages in Products Liability Cases*, 1980 DET. C.L. REV. 647, 648.

[242] *See* Owen, *supra* note 33, at 1282; Note, *supra* note 1, at 433.

[243] *See* Note, *supra* note 28, at 466.

[244] *See* Owen, *supra* note 33, at 1282 n.127.

consider whether retributive goals can justify punitive damages in the products liability context.

1. *Principles of Retributive Justice*

An important principle of retributive justice is the notion of desert.[245] The desert theory dictates that retributive measures be imposed only when the actor has voluntarily and inexcusably committed a wrongful act.[246] When a detriment is deserved, however, its imposition on the offender is an objective in itself, and the sanction does not have to produce any other benefit.[247] Other considerations, however, also come into play when detriments imposed by law are justified in terms of retributive justice. For example, any punishment imposed on the wrongdoer must be reasonably proportioned to the offense.[248] In addition, no punishment should be imposed for an act unless it has been authoritatively declared to be wrongful before its commission.[249] Additionally, the concept of fair procedure requires that the offender's guilt be established by methods minimizing the danger of punishing innocent defendants.[250]

Therefore, with these principles in mind, analyzing punitive damages from the perspective of retribution requires two fundamental questions be answered. First, are the actual wrongdoers punished when courts impose punitive damages on the manufacturers of defective products? Second, is punishment imposed in a fair and principled manner when punitive damages are injected into products liability litigation? In response to the first question, arguably the "sting" of punitive damages falls largely on shareholders and other innocent parties rather than on wrongdoers in

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[245] *See* G. FLETCHER, RETHINKING CRIMINAL LAW § 6.3.2, at 414-20 (1978); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-107 (1965); Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1232 (1978-79) [hereinafter cited as *Developments*].

[246] *See* Mundel, *Punishment and Desert*, in THE PHILOSOPHY OF PUNISHMENT 65, 71 (H. Acton ed. 1969); Quinton, *On Punishment*, in THE PHILOSOPHY OF PUNISHMENT 56, 58-59 (H. Acton ed. 1969).

[247] *See* Ellis, *supra* note 37, at 4.

[248] *See id.* at 6.

[249] This is sometimes referred to as the principle of "legality." *See id.* at 5.

[250] Note, *Punitive Damages in California: The Drunken Driver*, 36 HASTINGS L.J. 793, 798 (1985).

the product manufacturer's corporate management.[251] As for the second question, the assessment of punitive damages against product manufacturers may be unfair in a number of ways. First, the conventional punitive damages liability formula, expressed in terms of malice or reckless conduct, is not well adapted to institutional behavior and thus fails to provide corporate decision makers with a clear idea of proscribed conduct.[252] Second, permitting assessment of punitive damages more than once for a single design defect results in punishment wholly disproportionate to the degree of wrongdoing.[253] Finally, the joinder of strict liability and punitive damages claims prejudices the defendant's case for compensatory damages.[254]

2. *Effectiveness of Punitive Damages as a Means of Punishment*

It is self-evident that punitive damages cannot serve any legitimate retributive function if the wrongdoer does not actually bear the sanction imposed by society. Accordingly, it must be considered whether the manufacturer of defective products can avoid punishment by shifting the cost of the penalty to others. Some commentators maintain that a culpable manufacturer will frequently pass the cost of punitive awards on to its customers either directly through higher prices or indirectly through liability insurance.[255] If this occurs, the public in effect foots the bill for a penalty imposed for its own protection.[256]

The manufacturer's ability to shift costs directly through higher prices largely depends upon its competitive situation. If demand for the product is inelastic, the culpable manufacturer may be able to treat punitive damages as a cost of doing business and shift the cost on to the public in the form of higher prices.

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[251] *See* notes 255-83 *infra* and accompanying text.

[252] *See* notes 284-370 *infra* and accompanying text.

[253] *See* notes 371-418 *infra* and accompanying text.

[254] *See* notes 419-54 *infra* and accompanying text.

[255] *See* Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57, 60 (1975-76); Coccia & Morrissey, *supra* note 45, at 62.

[256] *See* Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245, 251 (1977-78); Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNS. J. 402, 406 (1977).

In a competitive industry, however, the manufacturer will not be able to increase prices at will, and, therefore, may be forced to absorb punitive damages costs itself.[257] This will lead to lower profits and result in stockholder complaints about the quality of management.[258] Thus, wrongdoers within company management ultimately will be punished although innocent shareholders will suffer as well.

It is also claimed that punitive damages do not really punish manufacturers because they can insure against such liability.[259] Thus, if insurance proceeds cover losses from punitive awards, the consuming public, not the manufacturer, will suffer through higher insurance premiums.[260] This argument is not persuasive, however. Some states prohibit insurance coverage for punitive damages on grounds of public policy.[261] *Northwestern National Casualty Co. v. McNulty*[262] is the leading proponent of this view. According to the *McNulty* court, "Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct."[263]

Furthermore, the culpable manufacturer will not completely escape the consequences of its wrongdoing, even where courts allow insurance coverage of punitive damages. First, many industrial insurance policies have very high deductible provi-

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[257] *See* Wangen v. Ford Motor Co., 294 N.W.2d 437, 452 (Wis. 1980).

[258] *See id.*

[259] *See* Ghiardi & Kircher, *supra* note 34, at 37-40.

[260] *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967); Ghiardi & Koehn, *supra* note 256, at 251.

[261] *See* Snyman, *supra* note 256, at 405 n.31.

[262] 307 F.2d 432 (5th Cir. 1962) (punitive damages assessed against drunk driver).

[263] *Id.* at 440. The majority of states appear to allow insurance coverage against punitive damage judgments. *Cf.* Burrell & Young, *Insurability of Punitive Damages*, 62 MARQ. L. REV. 1, 18 (1978-79) (trend to allow coverage); Note, *supra* note 1, at 431-32, 443-45 (jurisdictions equally split but a trend to allow coverage). Arkansas, Arizona, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, New Mexico, Oregon, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin presently allow insurance coverage of punitive damages, while California, Colorado, Connecticut, Illinois, Kansas, New Jersey, New York, Oklahoma and Pennsylvania prohibit such coverage. *See* J. GHIARDI & J. KIRCHNER, *supra* note 21, §§ 7.29-.30 (1984 & Supp. 1984).

sions.[264] Second, companies with high insurance claims will eventually be forced to pay higher insurance premiums.[265]

Consequently, one can fairly conclude that punitive damages will sometimes, but not always, be an effective mechanism for punishment. On the other hand, there is a significant chance that the brunt of punitive awards will fall on innocent parties rather than those in corporate management who are the real target of punitive measures.

3. *Punishment of Innocent Parties*

Assuming that the manufacturers will be unable to shift the cost of punitive damages to the public, who ultimately will feel the effect of these sanctions? The persons who presumably deserve punishment are those corporate employees who engage in wrongdoing or encourage acts of wrongdoing by others.[266] Obviously, these employees go unpunished when punitive damages are assessed against a product manufacturer, if the business entity, rather than individual wrongdoers, actually pay the judgment.[267] As the *Roginsky v. Richardson-Merrell*[268] court observed since punitive damage awards must be paid out of corporate earnings, the penalty ultimately falls on shareholders and others who are innocent of wrongdoing.[269] Of course, this result is not limited to products liability cases; it occurs whenever courts impose punitive damages vicariously on a business entity.[270]

Although most states allow imposition of punitive damages on a vicarious liability basis, they disagree about when such

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[264] *See* Note, *supra* note 8, at 445.

[265] *See id.* Insurance is usually provided on a "loss-rated" basis. Under this approach, insurance companies set their rates on a retrospective basis. Initial rates are calculated on a general industry basis. Later rates are a function of the company claims experience with the individual policyholder. Thus, a manufacturer incurring a series of large punitive damage judgments eventually will pay much higher premiums than business competitors with better claims records. *Id.* at 445 n.56.

[266] *See* Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1306-07 (1960-61).

[267] For a general criticism of imputing wrongful employee acts to the employer, see *id.* at 1301-10.

[268] 378 F.2d 832 (2d Cir. 1967).

[269] *See id.* at 841. *See also* Note, *supra* note 266, at 1304-10.

[270] *See generally* Note, *supra* note 266, at 1296-1310 (discussing effects of punitive damages on businesses outside products liability context).

liability is appropriate. The majority appear to apply the so-called "vicarious liability rule" under which punitive damages may be assessed against the corporation for the misconduct of employees acting within the scope of their employment.[271] Other jurisdictions take a more lenient view, following the "complicity rule" which imposes liability only when corporate officers order, participate in, consent to, or otherwise ratify the wrongful acts of their employees.[272]

Although the complicity rule is less harsh than the vicarious liability rule, these two approaches differ merely in degree, since both authorize vicarious punitive damage liability based on employee conduct.[273] The imposition of sanctions on a vicarious liability basis cannot be justified on retributive grounds because the ultimate objects of the punitive measures are shareholders and others who have committed no wrongful act.[274] Under the theory of just desert it is not proper to subject these innocent parties to punishment.[275] In the words of one commentator:

> The punishment function is not a principled basis for the imposition of punitive damages on one who by definition is innocent of wrongdoing; punishing the innocent is generally conceded to be morally reprehensible and inconsistent with the notions of fundamental fairness underlying our system of justice.[276]

Some scholars have attempted to justify vicarious liability on nonretributive grounds. For example, they argue that punitive

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[271] *See* K. REDDEN, *supra* note 39 § 4.14, at 131; Parlee, *Vicarious Liability For Punitive Damages: Suggested Changes in the Law Through Policy Analysis*, 68 MARQ. L. REV. 27, 31-32 (1984). Note, *Liability of Employers for Punitive Damages Resulting from Acts of Employees*, 54 CHI.-KENT L. REV. 829, 841 (1977-78).

[272] *See* Sales, *supra* note 34, at 367; Comment, *supra* note 33, at 774. Sales & Cole, *supra* note 5, at 1139-40. *See also* Restatement (Second) of Torts § 909 (1979).

[273] Ellis, *supra* note 37, at 63-64.

[274] *See* P. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 112 (1962) (criminal law context); Schwartz, *supra* note 37, at 136; Parlee, *supra* note 271, at 50.

[275] *See* P. FITZGERALD, *supra* note 274, at 112. A similar situation occurs when punitive damages are awarded against local municipalities. Innocent taxpayers are punished rather than culpable municipal employees. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 263 (1981); Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965).

[276] Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1005, 1037 (1980-81) (footnote omitted).

damage awards do not ascribe personal blame to shareholders, but merely function as a device to recoup illicit profits from the sale of defective products.[277] The sale of defective products apparently is thought to give the defendant an unfair competitive advantage over more socially responsible manufacturers.[278] However, it is difficult to reconcile this rationale with either the underlying theory of punitive damages or the manner in which punitive damage awards are calculated in practice.[279] If punitive damages are justified on either an unjust enrichment or an unfair competition theory, damage awards should explicitly reflect the defendant's illicit gain. Moreover, if punitive damages are to be based on a restitutional rationale, the defendant's competitors (or perhaps the public) should recover since they are victimized in this respect, not the injured consumer.

Punitive sanctions may not adversely affect shareholders only. If punitive awards undermine the product manufacturer's economic condition, creditors, suppliers, and employees will also be harmed.[280] If punitive damage awards deplete the defendant's resources, the awards even will harm future litigants.[281] Punitive awards may also injure the public in one of two ways. On the one hand, if the defendant corporation is in a strong competitive position, it will pass the costs of punitive damages awards on to

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[277] *See* Owen, *supra* note 33, at 1304-05; Note, *supra* note 26, at 407.

> Punitive damages admittedly are an imprecise mechanism for achieving this objective and shareholders will in fact be penalized when punitive damages awards exceed excessive profits. Yet this penalty may be viewed as a fair assessment against both the manufacturing entity for its willingness to gamble recklessly with the public safety and the shareholders for whose benefit the marketing decision was made.

Owen, *supra* note 33, at 1304-05.

[278] Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979), *opinion mod. on reh'g*, 615 P.2d 621 (Alaska 1980), *cert. denied* 454 U.S. 894 (1983).

[279] The jury appears to have used the illicit profit approach in *Sturm*. Evidence at trial indicated that the manufacturer could have corrected the design defect at a cost of $1.93 per revolver. Apparently, the jury multiplied this figure by 1.5 million, the number of guns produced, to arrive at an award of $2,895,000. *See* 594 P.2d at 50 (Burke, J., dissenting). The appellate court, however, ruled that it was improper to punish the defendant for wrongs committed against other consumers and reduced the award to $250,000. *See id.* at 48-49.

[280] *See* Coffee, *"No Soul to Damn; No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 401-02 (1980-81); DuBois, *supra* note 38, at 349.

[281] *See* Long, *supra* note 24, at 887 (general tort context).

consumers in the form of higher prices.[282] On the other hand, if such awards force a company to cut production or go out of business, this may destroy competition or deprive the public of desirable goods and services.[283] In either event, the general public suffers as much from these punitive measures as any actual wrongdoers.

4. *Problems with the Liability Standard*

The liability standard, which the judge and jury employ to determine whether punitive damages should be imposed, is difficult to justify from a retributive standpoint. The problem with this liability standard is that it is not well-suited to institutional behavior and, therefore, fails to provide corporate decision makers with a clear idea of proscribed conduct. Under the conventional liability standard, a "positive element of conscious wrongdoing" is necessary before punitive damages may properly be awarded.[284] Thus, not only must the defendant be at fault in causing the plaintiff's injury, he also must have an evil mind.[285] Over the years the courts have employed a variety of expressions to describe this culpable state of mind and the resulting type of conduct. Terms such as "malice," "ill will," "fraud," and "oppression" are often invoked.[286] Other states also allow assessment of punitive damages when the defendant has acted "wantonly," "recklessly," or with "conscious disregard or indifference toward the interests of others."[287] However, these

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[282] *See* 378 F.2d at 841; Carsey, *supra* note 255, at 60.

[283] Note, *supra* note 4, at 68-69.

[284] McCormick, *supra* note 16, at 134.

[285] *See* Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158, 1163 (1966); Comment, *supra* note 22, at 898.

[286] *See, e.g.*, Silberg v. California Life Ins. Co., 521 P.2d 1103, 1110 (Cal. 1974) (oppression, fraud, or malice); General Motors Corp. v. Piskor, 352 A.2d 810, 817 (Md. 1976) (fraud, malice, evil intent, or oppression) (punitive damages instructions also proper where assault or false imprisonment is committed in a "wanton or malicious manner"), *aff'd upon remand*, 381 A.2d 16 (Md. 1977); MONT. CODE ANN. § 27-1-221 (1983) (oppression, fraud, or malice); NEV. REV. STAT. § 42.010 (1981) (oppression, fraud, or malice); N.D. CENT. CODE § 32-03-07 (Supp. 1983) (oppression, fraud, or malice); S.D. CODIFIED LAWS ANN. § 21-3-2 (1979) (oppression, fraud, or malice).

[287] *See, e.g.*, Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972) (willfully and wantonly); McClellan v. Highland Sales & Inv. Co., 484 S.W.2d 239, 242 (Mo. 1972)

liability formulas originally were developed to punish outrageous behavior by private individuals[288] or oppressive abuses of power by government officials.[289] Concepts like malice and recklessness, which focus on the mental state of the individual wrongdoer,[290] are not very meaningful when applied without modification to the actions of corporate product manufacturers.[291]

The Restatement's formula suffers from the same weakness. Section 908 provides, "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."[292] Designed for general use in all types of tort situations, this formula is also oriented primarily toward individual conduct.[293] Nevertheless, many courts have also applied it to products liability cases.[294]

The Restatement formulation distinguishes between malice and reckless indifference to the rights of others.[295] Malice typically involves an intentional act coupled with a desire to harm another. The most common situation arises when the defendant deliberately causes the injury because of ill will toward the

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(willful, wanton, malicious, or reckless); Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 358 A.2d 805, 811 (N.J. Super. Ct. App. Div. 1976) (wanton and willful disregard of the rights of another); Jeffers v. Nysse, 297 N.W.2d 495 (Wis. 1980) (wanton, willful, or reckless disregard of the plaintiff's rights). A few states also allow punitive damages when the defendant is guilty of gross negligence. *See, e.g.*, Randall v. Ganz, 537 P.2d 65, 67 (Idaho 1975); Hibschman Pontiac, Inc. v. Batchelor, 362 N.E.2d 845, 847 (Ind. 1977); Newton v. Hornblower, Inc., 582 P.2d 1136, 1150 (Kan. 1978); Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970).

[288] *See* Coccia & Morrissey, *supra* note 45, at 46. *See also* Owen, *supra* note 42, at 15.

[289] *See* Owen, *supra* note 33, at 1365.

[290] *See* Comment, *supra* note 33, at 773.

[291] *See* Owen, *supra* note 42, at 16 (describing the fragmented corporate decision making process). *See also* Boddie v. Litton Unit Handling Sys., 455 N.E.2d 142, 152 (Ill. App. Ct. 1983).

[292] RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

[293] *See* Acosta v. Honda Motor Co., 717 F.2d 828, 834 (3d Cir. 1983).

[294] *See id.*; D'Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 894 (9th Cir. 1977); Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 145-46 (3d Cir. 1973); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 374-75 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (3d Cir. 1985); Thomas v. American Cystoscope Makers, 414 F. Supp. 255, 266 (E.D. Pa. 1976); 594 P.2d at 46; American Laundry Mach. Indus. v. Horan, 412 A.2d 407, 419 (Md. App. 1980).

[295] *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

victim, or some other evil motive.[296] Also, the law can presume intent to injure if the defendant acts knowing that his conduct will cause injury to another.[297] In this situation, the injury can be termed intentional, thus indicating a culpable mind without actual ill will. This is sometimes referred to as "constructive malice."[298] The imposition of punitive damages for malicious conduct is consistent with retributive goals because one intentionally injuring another deserves punishment under the theory of just desert.[299] Malice in this sense, however, rarely occurs in products liability cases since no manufacturer would deliberately set out to injure thousands of anonymous consumers.[300]

Recklessness is the second type of conduct for which the Restatement prescribes punitive damages as a remedy.[301] Section 908 does not define reckless conduct,[302] but Section 500 provides:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[303]

As the comment to Section 500 points out, to be guilty of recklessness, the defendant must subject the plaintiff to a risk much greater than that associated with ordinary negligence:[304] "It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary neg-

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[296] *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 205 (1973); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 280 (1935).

[297] *See* Comment, *supra* note 22, at 898.

[298] *See* Note, *supra* note 8, at 448.

[299] *See* Ellis, *supra* note 37, at 21-22.

[300] *See* Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769, 772 (1976-77); Comment, *supra* note 22, at 911.

[301] *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

[302] *See id.*

[303] *Id.* at § 500.

[304] *See id.* at § 500 comment a.

ligence."[305] Not only must the risk be extremely great, but it also must be so obvious that knowledge of the risk can be imputed to the defendant under the reasonable prudent person standard.[306]

Recklessness, in various forms, is a popular liability formula for products liability cases. The Model Uniform Product Liability Act[307] employs similar language. Section 120(a) of the Uniform Act allows the award of punitive damages when an injury results from the "product seller's reckless disregard for the safety of product users, consumers, or others who might be harmed by the product."[308] "Reckless disregard" is defined as "conscious indifference to the safety of persons who might be injured by the product."[309] Both "reckless disregard" and "conscious indifference to public safety" are often employed in products liability cases.[310]

Product manufacturers, however, claim that "recklessness" as a liability standard for punitive damages is excessively vague when applied to products liability litigation.[311] For example, the corporate defendant in *Sturm, Ruger & Co. v. Day*[312] contended that Alaska's standard for imposing punitive damages violated its due process rights by not providing fair warning as to what conduct would result in liability. The court, however, rejected this argument, citing its previous adoption of the Restatement formula[313] as evidence that a clear standard had been specified. According to the court, the Restatement view would permit the

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[305] *Id.*

[306] *See id.*

[307] MODEL UNIFORM PRODUCT LIABILITY ACT, *reprinted in* 44 Fed. Reg. 62,714 (Dept. of Commerce offered Oct. 31, 1979) [hereinafter cited as MUPLA].

[308] *Id.* at 62,748, § 120(A).

[309] *Id.* at 62,749 (analysis of MUPLA Section 120).

[310] *See* G.D. Searle & Co. v. Superior Court, 122 Cal. Rptr. 218, 225 (Cal. Ct. App. 1975) (conscious disregard of safety); Rinker v. Ford Motor Co., 567 S.W.2d 655, 668 (Mo. Ct. App. 1978) (conscious disregard for the safety of others); Thiry v. Armstrong World Indus., 661 P.2d 515, 518 (Okla. 1983) (reckless disregard); Wangen v. Ford Motor Co., 294 N.W.2d at 442 (reckless indifference for others' rights and conscious deliberate disregard for them).

[311] *See, e.g.*, notes 312-13, 316, 319-20 *infra* and accompanying text.

[312] 594 P.2d 38 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980), *cert. denied*, 454 U.S. 894 (1981).

[313] *See id.* at 46 (quoting Bridges v. Alaska Housing Auth., 375 P.2d 696, 702 (Alaska 1962) (citing RESTATEMENT OF TORTS §§ 908, 908(2) (1939)).

jury to award punitive damages if the plaintiff demonstrated that the manufacturer knew the product was defective, was aware of the resulting deaths or injuries, but nevertheless continued to market the product with reckless disregard for public safety.[314]

The defendant in *Neal v. Carey Canadian Mines, Ltd.*,[315] an asbestos case, made a similar assertion.[316] The court, however, observed that the liability standard was no more vague than proximate cause and similar legal concepts.[317] The court declared that "the standard for outrageous conduct—'willfully, maliciously or so carelessly as to indicate wanton disregard of the rights of the party injured'—provides sufficient notice to a defendant of the consequences that such a wrongful act may have in a suit brought by plaintiffs for damages."[318]

Finally, the Dalkon Shield manufacturer in *Palmer v. A.H. Robins Co.*[319] challenged Colorado's punitive damages statute, alleging that the statute was unconstitutionally vague in violation of due process of law.[320] In response, the court noted that the operative terms, "fraud" and "wanton and reckless disregard," were familiar legal concepts, and therefore afforded the defendant sufficient notice of proscribed conduct to satisfy constitutional requirements.[321]

Although the courts have been unwilling to invalidate on due process grounds the conventional punitive damage liability formulas, no one has suggested that any of them are models of clarity. All of these formulas suffer from one inescapable deficiency: they are based on a model of individual behavior.[322]

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[314] *See id.*

[315] 548 F. Supp. 357 (E.D. Pa. 1982).

[316] One of the corporate defendants argued that imposition of punitive damages violated its due process guarantees. According to the defendant, there was inadequate notice of the condemned conduct since the standards for liability were vague. The defendant contended that the judge and jury were free to decide the prohibited conduct issue without any legally fixed standards. *See id.* at 377.

[317] *See id.*

[318] *Id.*

[319] 684 P.2d 187 (Colo. 1984).

[320] *See id.* (construing COLO. REV. STAT. § 13-21-102 (1973)).

[321] *See id.* at 214-15.

[322] *See generally* Owen, *supra* note 33, at 1361-67 (discussing the theory and standards of liability for punitive damages in products liability cases).

Consequently, when courts apply these standards to products liability cases, they must impute human characteristics to a corporate entity.[323]

To remedy this problem, Professor Owen has proposed a standard that is specifically tailored to products liability litigation. Under his approach, "[p]unitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects a flagrant indifference to the public safety."[324] According to Professor Owen, the "flagrant indifference" test requires an objective decision about the manufacturer's apparent attitude, not a subjective finding of the manufacturer's actual state of mind.[325] The term "indifference to public safety" implies a basic disrespect and consequent disregard for others, while the word "flagrant" involves much more serious misconduct than inadvertent behavior.[326] The flagrant indifference approach is an improvement over the conventional liability standards and has already received considerable judicial acceptance.[327] Nevertheless, the concept of punitive damages is so inextricably tied to notions of individual wrongdoing that it is virtually impossible to formulate a general liability standard that can be applied in a meaningful way to the kind of collective decision-making that occurred in product design.

Although no abstract formula can identify with specificity the type of conduct that will be sanctioned,[328] it may be possible to get some idea of proscribed conduct by looking for recurring patterns in court decisions.[329] Not only does this approach help clarify the meaning of the liability formula, but it also focuses attention on the retributive purpose behind imposing punitive damages on product manufacturers.[330] To pose the issue differ-

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[323] *See* 455 N.E.2d at 152.

[324] Owen, *supra* note 33, at 1367.

[325] *See id.* at 1368.

[326] *See* Owen, *supra* note 42, at 24; Owen, *supra* note 33, at 1368-69.

[327] *See* Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 815-16 (6th Cir. 1982); Moore v. Remington Arms Co., 427 N.E.2d 608, 617 (Ill. App. Ct. 1981); Liechtamer v. American Motors Corp., 424 N.E.2d 568, 580 (Ohio 1981).

[328] *See* Owen, *supra* note 33, at 1326 (appropriate standard requires breadth for flexibility but specificity to give manufacturers adequate notice).

[329] *See* Owen, *supra* note 33, at 1326-28.

[330] *See id.* at 1326.

ently, one might ask what conduct does society wish to punish when imposing punitive damages on product manufacturers? There is general agreement that placing a defective product on the market, in and of itself, is not enough to warrant punishment.[331] What additional element, then, makes the product manufacturer's conduct both sufficiently blameworthy, and sufficiently threatening to a recognized public interest, to justify the imposition of punitive sanctions?

In product development cases, punitive damages have been awarded for inadequate product testing and for ignoring known risks when designing a product. On the other hand, courts generally have been reluctant to award punitive damages when the manufacturer was unaware of the risk posed by its product.[332] A few courts have imposed liability for failure to discover a dangerous condition when routine product testing would have revealed the risk, but these cases also involved express or implied representations of safety by the manufacturer.[333] For example, in *Sabich v. Outboard Marine Corp.*,[334] the plaintiff was injured when the snowmobile he was driving rolled over while descending a twenty-four to thirty-eight degree slope. The jury assessed punitive damages against the manufacturer. The defendant claimed in its promotional statements that the snowmobile could operate on inclines up to forty-five degrees when, in fact, the defendant never tested the vehicle on slopes to determine at what point the snowmobile would overturn.[335]

The design itself also may be a source of punitive damage liability. Usually the product design involves a risk of serious

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[331] *See id.* at 1367.

[332] *See* 717 F.2d at 841; Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 738 (5th Cir. 1980); Knippen v. Ford Motor Co., 546 F.2d 993, 1003 (D.C. Cir. 1976); Cochran v. Rockwell Int'l Corp., 564 F. Supp. 237, 243 (N.D. Miss. 1983); 414 F. Supp. at 267; 427 N.E.2d at 618; Harley-Davidson Motor Co. v. Wisniewski, 437 A.2d 700, 704-05 (Md. Ct. Spec. App. 1981).

[333] *See* 424 N.E.2d at 582. *Cf.* 552 F.2d at 104; Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981).

[334] 131 Cal. Rptr. 703 (Cal. Ct. App. 1976).

[335] *See* Owen, *supra* note 33, at 1342 (citing letter from plaintiff's attorney, Daniel Wilcoxera, to David G. Owen, July 16, 1975). The appellate court, however, reversed the punitive damages award because of an erroneous jury instruction on the required standard of proof. *See* 131 Cal. Rptr. at 711.

injury to users or bystanders. In addition, the risk normally is one that the manufacturer can eliminate or reduce at relatively small cost.[336] Most of these cases have involved motor vehicles. In *Grimshaw v. Ford Motor Co.*,[337] *Wangen v. Ford Motor Co.*,[338] and *American Motors Corp. v. Ellis*,[339] the courts emphasized that the risk of being badly burned was a serious one, that the manufacturer was aware of the hazard, and that the manufacturer failed to install safety devices that could have substantially reduced the risk of fire from rear-end collisions.[340]

Although violation of government or industry safety standards may provide a basis for awarding punitive damages,[341] compliance with such standards does not appear to immunize the manufacturer from liability in design defect cases. For example, in *Gryc v. Dayton-Hudson Corp.*,[342] the manufacturer was held liable for punitive damages even though its pajamas complied with the flammability standards set by the federal Flammable Fabrics Act.[343] The Minnesota court held that compliance with the federal regulation did not preclude the jury from concluding that the defendant had acted with reckless disregard for the plaintiff's safety.[344] Likewise, a federal circuit court in *Dorsey v. Honda Motor Co.*,[345] held that the manufacturer could have acted with reckless indifference for the rights of others even though it complied with federal automobile safety standards.[346] The plaintiff, severely injured when his subcompact

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[336] *Cf.* Airco, Inc. v. Simmons First Nat'l Bank, 638 S.W.2d 660 (Ark. 1982) (use of defective optional device caused injury). *But cf.* 412 A.2d at 420 (no reason additional safety device not used).

[337] 174 Cal. Rptr. 348 (Cal. App. 1981).

[338] 294 N.W.2d 437 (Wis. 1980).

[339] 403 So. 2d 459 (Fla. Dist. Ct. App. 1981).

[340] *See* 174 Cal. Rptr. at 384-85; 403 So. 2d at 467; 294 N.W.2d at 462. *Accord* Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 475, 481 (Ga. Ct. App. 1984).

[341] *See* Owen, *supra* note 33, at 1335.

[342] 297 N.W.2d 727 (Minn. 1980), *cert. denied sub nom.*, Riegel Textile Corp. v. Gryc *ex rel.* Gryc, 449 U.S. 921 (1980).

[343] *See id.* at 733-36; Flammable Fabrics Act of 1953, ch. 164, § 4, 67 Stat. 111 (1953) (amended 1954). *See also* 16 C.F.R. §§ 1610.3(2), 1610.4 (1984). The Act was later amended to require stricter regulation of the fabric used in children's sleepwear. *See* 297 N.W.2d at 733 n.2.

[344] *See* 297 N.W.2d at 733-34.

[345] 655 F.2d 650 (5th Cir. 1981), *opinion modified on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982).

[346] *See id.* at 656.

car collided with a full-size vehicle, claimed that the Honda automobile could have been designed more safely without foregoing the advantages of a small car.[347]

Product marketing activities include misrepresentation about product safety, concealment of hazardous conditions, and failure to correct hazards after their discovery. When the manufacturer makes affirmative misrepresentations to induce consumers to buy a product, the manufacturer is engaging in conduct that is universally regarded as undesirable.[348] False claims about product safety not only deceive the consumer into thinking that the product is better than it is, but misplaced reliance on such claims also can lead to unnecessary accidents.[349] *Leichtamer v. American Motors Corp.*[350] is illustrative of this principle. The manufacturer was aware of the Jeep's tendency to pitch-over, yet advertisements encouraged Jeep owners to drive down steep slopes.[351]

Concealment is closely related to misrepresentation. The latter involves affirmative representations, while the former merely involves a failure to divulge information. Often a manufacturer is guilty of both at the same time. Thus, in *Roginsky*[352] and *Toole v. Richardson-Merrell, Inc.*[353] the defendants not only suppressed data about the harmful side effects of MER/29, but also continued to assure the public that the drug was safe.[354] The asbestos cases reveal a similar pattern of behavior on the part of some asbestos manufacturers.[355] Concealment, however, may also occur prior to the marketing phase. For example, in *Piper Aircraft Corp. v. Coulter*,[356] the occupants of an airplane

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[347] *Id.* at 655-56. *See also* Cloroben Chem. Corp. v. Comegys, 464 A.2d 887, 893 (Del. 1983) (failure of manufacturer to change product after gaining knowledge of the defect indicates willful and wanton act).

[348] *See* Owen, *supra* note 33, at 1334.

[349] *See* 424 N.E.2d at 579-80.

[350] 424 N.E.2d 568 (Ohio 1981).

[351] *Id.* at 579.

[352] 378 F.2d 832.

[353] 60 Cal. Rptr. 398 (Cal. Ct. App. 1967).

[354] *See* 378 F.2d at 835-36; 60 Cal. Rptr. at 398, 404-08, 416. *See also* Rheingold, *supra* note 55, at 117-20.

[355] *See, e.g.*, Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1039-40 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 1749 (1985); 548 F. Supp. at 375-76; Fischer v. Johns-Manville Corps., 472 A.2d 577, 580-81 (N.J. Super. Ct. App. Div. 1984).

[356] 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983).

died in a crash caused by a faulty door latch.[357] A test pilot apparently discovered the defective design when the airplane first was developed. Instead of redesigning the door latch, however, the manufacturer ordered the test pilot to destroy the records of the problem.[358]

Concealment should not be confused with failure to provide an adequate warning. A manufacturer who is aware of a serious risk and, for commercial reasons, chooses not to disclose the risk has made a conscious decision to make greater profits by subjecting the public to an unnecessary risk.[359] Such conduct is contrary to accepted social norms and justifiably deserves punishment.[360] A warning that does not explain clearly the nature of the risk, or one that inadvertantly fails to disclose some risks or some aspects of them to the consumer, may make the product defective, but this deficiency alone should not subject the manufacturer to punitive damages.[361]

Generally, case law supports this distinction between concealment and failure to warn adequately. For example, in *Johnson v. Husky Industries*,[362] the court reversed a punitive damage award based on the defendant's failure to provide an adequate warning. In *Johnson*, a family of four died of asphyxiation from carbon monoxide fumes produced by the defendant's charcoal briquets. The manufacturer knew the product could be lethal when used indoors without sufficient ventilation and, therefore, placed on the bag a warning that said "CAUTION — FOR INDOOR USE — COOK ONLY IN PROPERLY VENTILATED AREAS." The appellate court believed that the warning, though inadequate, was not such as "to raise a presumption of conscious indifference to consequences."[363] A similar result

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[357] *See id.* at 1109.

[358] *See id.* at 1110. Later Piper Aircraft Corp. redesigned the plane to remedy the problem, but did not warn purchasers of the earlier defect. *See id.*

[359] The cost of the warning may be low, but the lost sales due to the loss of consumer confidence may be significant. *See* Owen, *supra* note 33, at 1294 n.183.

[360] *See id.* at 1352.

[361] *See id.*

[362] 536 F.2d 645 (6th Cir. 1976).

[363] *See id.* at 650-51. *But cf.* Hill v. Husky Briquetting, Inc., 220 N.W.2d 137 (Mich. Ct. App.), *aff'd*, 223 N.W.2d 290 (Mich. 1974) (directed verdict against plaintiff's compensatory damage claim reversed on similar facts).

was reached in *Kritser v. Beech Aircraft Corp.*[364] The manufacturer failed to place a "baffle" in the fuel tank of its Baron D-55 aircraft to prevent fuel from moving away from the fuel outlet during certain flight maneuvers. Nevertheless, the defendant warned against engaging in such maneuvers, although it did not fully explain the nature of the risk involved. The appellate court upheld the trial court's refusal to submit the issue of punitive damages.[365]

The last type of product marketing conduct involves failure to take remedial measures once the manufacturer has become aware of a dangerous condition in the product. One of the most common situations is failure to issue a warning after discovering a hazard. The courts' approach in these types of cases, most of which involve pharmaceutical products, is similar to that applied to concealment.[366] In other words, failure to warn once a risk becomes known may result in the imposition of punitive damages. In some cases, however, more than a warning may be necessary once a risk is discovered. For example, in *Cloroben Chemical Corp. v. Comegys*,[367] the appellate court upheld a punitive damages award against the distributor of a sulfuric acid drain cleaner. The defendant was aware that its product, "Drain Snake," was available to the public even though the cleaner was intended for professional use only. Accordingly, the court ruled that after becoming aware of the danger to consumers, the defendant's refusal to place a safer cap on its product was sufficiently culpable to warrant exemplary damages.[368] Other courts have imposed liability in similar circumstances.[369]

This brief review of the case law permits certain observations about the liability standard. First, the manufacturer must be aware of the risk involved in the design or use of its product. Second, the manufacturer must make a conscious decision to

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[364] 479 F.2d 1089 (5th Cir. 1973).

[365] *See id.* at 1096-97.

[366] *See, e.g.*, Hilliard v. A.H. Robins Co., 196 Cal. Rptr. 117, 131-32 (Cal. Ct. App. 1983); 684 P.2d at 217-21; Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038, 1062-64 (Kan.), *cert. denied*, 105 S.Ct. 365 (1984).

[367] 464 A.2d 887 (Del. 1983).

[368] *See id.* at 891-92.

[369] *See, e.g.*, 594 P.2d at 47 (handgun); Cantrell v. Amarillo Hardware Co., 602 P.2d 1326 (Kan. 1979) (stepladder).

subject consumers to substantial risk of serious and unnecessary injuries to maximize profits. In other words, since manufacturers determine the degree of risk from defective products to which consumers are subjected, punitive damages may be imposed on those who take advantage of their control over the risk determination process to enhance their financial interests at the expense of society.[370] Nevertheless, the liability standard still presents problems. First of all, although manufacturers and others can determine after the fact that certain types of conduct will result in punishment, the requirement that they be given a clear idea of proscribed conduct *in advance* is not satisfied. Secondly, courts in the future are likely to expand the range of conduct that can be sanctioned by the imposition of punitive damages. There is certainly nothing in the concept of "recklessness" or "flagrant indifference" that will prevent this ad hoc expansion of liability from occurring. Thus, product manufacturers will be forced to adjust their conduct to a constantly changing standard of liability.

5. *Disproportionate Punishment*

The assessment of punitive damages against product manufacturers also violates the principle that punishment should be proportional to the degree of wrongdoing.[371] Excessive punishment is inconsistent with the principle of desert because "[p]unishment that is excessive is not deserved."[372] Disproportionate punishment in products liability cases can result from excessive verdicts in individual cases or from the cumulative effect of multiple punitive awards for the same wrongful act.

The uncertain criteria for determining the size of punitive damage assessments in individual cases allow the jury to act out of passion or prejudice,[373] thereby inflicting excessive punishment on the defendant in individual cases. Judicial supervision of jury

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[370] *See* 297 N.W.2d at 732-33.

[371] *See* Riewe v. McCormick, 9 N.W. 88, 89-90 (Neb. 1881).

[372] Ellis, *supra* note 37, at 6. *See* Mundel, *supra* note 246, at 71-72.

[373] *See* Ellis, *supra* note 37, at 53-57; Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 285-88 (1983). *See also* Ghiardi, *supra* note 24, at 287; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1188-89 (1931); Morris, *supra* note 60, at 226-27.

verdicts is not always sufficient to prevent this type of behavior.[374] Some jurisdictions require that a punitive damage assessment bear a reasonable relationship to the size of the compensatory award.[375] Although this rule places some constraint on unreasonable jury verdicts, however, it does not really protect against the risk of excessive punishment.[376] This is because compensatory damages reflect the plaintiff's injury, not the defendant's culpability;[377] consequently, neither the compensatory award, nor some multiple of it, necessarily bears any relation to the amount of punishment the defendant deserves.[378]

The problem of excessive verdicts in individual cases is greatly magnified in product liability litigation because a single act may result in numerous punitive damage claims.[379] The cumulative effect of multiple punitive damage awards can jeopardize the financial stability of even the largest product manufacturers.[380] Sometimes referred to as the "overkill problem,"[381] when multiple punitive damage awards bankrupt a company, this amounts to a form of corporate capital punishment, totally out of proportion to the degree of corporate wrongdoing and is neither desirable nor justifiable from a retributive standpoint.[382]

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[374] *See* Ellis, *supra* note 37, at 53-57; Wheeler, *supra* note 373, at 285-91. *See also* Ghiardi, *supra* note 24, at 287; Morris, *supra* note 373, at 1189; Morris, *supra* note 60, at 226.

[375] *See* Ellis, *supra* note 37, at 58. *See* Schroeder v. Auto Driveway Co., 523 P.2d 662, 672 (Cal. 1974); Addair v. Huffman, 195 S.E.2d 739, 743-44 (W. Va. 1973). *See also* Belli, *supra* note 2, at 11; Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823, 832 (1978).

[376] *See* Belli, *supra* note 2, at 12; Ellis, *supra* note 37, at 58; Comment, *supra* note 375, at 832.

[377] *See* 22 AM. JUR. 2d *Damages* §§ 11, 236 (1965).

[378] *See* Ellis, *supra* note 37, at 58.

[379] *See* Sales, *supra* note 34, at 370. Sales & Cole, *supra* note 5, at 1142.

[380] *See* Dubois, *supra* note 38, at 349; Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 153, 156-57.

[381] 378 F.2d at 839; Note, *supra* note 28, at 469.

[382] Note, *supra* note 380, at 156. A number of courts have declared that punitive damage awards are not intended to bankrupt the defendant. *See, e.g., In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.*, 459 U.S. 1171 (1983); 515 F. Supp. at 106; 661 P.2d at 518. *But see* Martin v. Johns-Manville Corp., 469 A.2d 655, 665 (Pa. Super. 1983) (product manufacturer must accept consequences of wrongdoing even if it results in bankruptcy), *vacated*, 494 A.2d 1088 (Pa. 1985).

There is considerable disagreement about whether the overkill problem is real.[383] In *Roginsky*, Judge Friendly expressed concern about the aggregate effect of punitive damage awards on product manufacturers.[384] This fear proved to be unfounded, at least in the instance of the defendant Richardson-Merrell.[385] Only eleven of more than one thousand MER/29 cases were tried.[386] The defendant won four of these cases, while the plaintiffs won the other seven.[387] Three juries awarded punitive damages, one of which was reversed on appeal.[388] In the remaining two cases, the trial judge ordered a remittitur.[389] The total amount of compensation Richardson-Merrell and its insurers paid to MER/29 victims amounted to $22 million, and of that, only $1 million was paid for punitive damages.[390]

A federal Interagency Task Force on Product Liability, which drafted the Uniform Product Liability Act, also found that the overkill problem was not serious.[391] The task force based its conclusion on a closed claims survey conducted by the Insurance Services Offices (ISO) in 1976-77.[392] The Wisconsin Supreme Court relied on the ISO survey when it rejected Ford's overkill argument in *Wangen*.[393] However, the situation has changed dramatically since the ISO survey.[394] Nowadays an increasing number of accident victims are seeking punitive damages against

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[383] *See* notes 384-96, 414 *infra* and accompanying text. *See also* Note, *supra* note 28, at 469.

[384] 378 F.2d at 839.

[385] Note, *supra* note 28, at 469. *See* text accompanying notes 386-90 *infra*.

[386] Note, *supra* note 28, at 469. *See* Rheingold, *supra* note 55, at 132.

[387] Rheingold, *supra* note 55, at 132-33; Note, *supra* note 28, at 469.

[388] Note, *supra* note 28, at 469. *See* Roginsky v. Richardson-Merrell, Inc., 254 F. Supp. 430 (S.D.N.Y. 1966), *aff'd in part, rev'd in part*, 378 F.2d 832 (2d Cir. 1967) (compensatory award affirmed, punitive award reversed).

[389] Note, *supra* note 28, at 469.

[390] Rheingold, *supra* note 55, at 137-41; Note, *supra* note 28, at 469 n.83. Richardson-Merrell's assets were estimated at $150-200 million. Rheingold, *supra* note 55, at 135.

[391] *See* note 390 *supra*.

[392] The Interagency Task Force declared: "While many product sellers have expressed great concern about the economic impact of punitive damages, the 'ISO Closed Claims Survey' suggests that the number of cases in which such damages are imposed is not substantial. 'ISO Closed Claims Survey' at 183." 44 Fed. Reg. 62,748 (1979).

[393] 294 N.W.2d at 456.

[394] Nelson, *supra* note 12, at 390.

product manufacturers,[395] and multimillion dollar verdicts, if not commonplace, are becoming more common.[396]

While a single substantial punitive damage award is unlikely to bankrupt a financially secure company, some manufacturers face the prospect of thousands of large punitive damage claims.[397] Even if they are resolved through litigation or settlement for relatively modest amounts, the cumulative effect of such claims could be staggering.[398] For example, more than 16,000 suits had been filed against Johns-Manville for asbestos-related injuries at the time the company petitioned for bankruptcy.[399] The manufacturer estimated that 52,000 lawsuits would eventually be brought against the company and projected potential liability at $2 billion.[400] The company based the estimate on an average cost of $40,000 per claim, including legal expenses.[401]

This figure would have been much higher if Johns-Manville had given more consideration to potential punitive damage claims when estimating liability. In fact, two years later, the company claimed that 14,000 cases seeking a total of over $50 billion were pending against it; 9300 of these suits included demands for punitive damages.[402] Moreover, since the Manville bankruptcy in 1982, punitive damage awards against the company have been

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[395] Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 38-39 (1983).

[396] *See, e.g.*, 655 F.2d 650 ($5 million); 638 S.W.2d 660 ($3 million); 174 Cal. Rptr. 348 ($3.5 million); 684 P.2d 187 ($6.2 million); 319 S.E.2d 470 ($8 million); 681 P.2d 1038 ($2.75 million); 297 N.W.2d 727 ($1 million); 424 N.E.2d 568 ($1 million); Ford Motor Co. v. Nowak, 638 S.W.2d 582 (Tex. Civ. App. 1982) ($4 million). Int'l Armament Corp. v. King, 686 S.W.2d 595 (Tex. 1985) ($3 million).

[397] Special Project, *supra* note 45, at 690-91.

[398] *Id.*; Comment, *supra* note 45, at 370-72.

[399] Note, *Mass Tort Claims and the Corporate Tortfeaser: Bankruptcy Reorganization and Legislative Compensatory Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1300 (1982-83). According to a study commissioned by Johns-Manville, the number of future lawsuits after 1982 was expected to range from 30,000 to 120,000. *See* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 528 n.29 (5th Cir. 1984).

[400] Seltzer, *supra* note 395, at 39 n.12.

[401] *Id.*; Note, *The Manville Bankruptcy*, *supra* note 399, at 1300 n.11. It is also interesting to note that the defense costs in the 3500 suits that Johns-Manville disposed of by 1982 were nearly equal to the total cost of the judgments rendered against it. Note, *supra* note 203, at 1129 n.44.

[402] 727 F.2d at 524.

upheld in three reported cases; these awards were for $240,000,[403] $300,000,[404] and $500,000.[405]

In some respects the Johns-Manville case is unique. Not only were thousands of persons exposed to asbestos,[406] but the evidence of misconduct against the company was overwhelming.[407] Perhaps no other product manufacturer will ever be placed in such a defenseless position, facing massive compensatory and punitive liability. Consequently, the Johns-Manville bankruptcy may not indicate that a serious overkill problem exists. Nevertheless, other manufacturers also face exposure to lawsuits from thousands of victims, many of whom also will seek punitive damages.[408] For example, over 5500 lawsuits have been filed against A.H. Robins, the manufacturer of the Dalkon Shield IUD.[409] Also, more than 1000 suits have been brought against the DES manufacturers.[410] Ford Motor Company reports approximately 700 suits filed against it in connection with transmission defects in some of its cars and trucks. Another 200 suits have been brought against American Motors for design defects in its Jeep vehicles.[411] Punitive damages have been recovered in at least one instance against the manufacturers of each of these products.[412] Other victims will undoubtedly seek punitive damages as well. Moreover, the overkill danger is not limited to

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[403] 472 A.2d at 579.

[404] 734 F.2d at 1046-47.

[405] 691 F.2d at 811.

[406] One study declared that more than twenty-one million American workers were significantly exposed to asbestos over the past forty years. Over the next twenty years, an estimated 8200 to 9700 of these workers are expected to die each year from asbestos related cancers. The total number of deaths from asbestos exposure will reach 200,000 by the end of the century. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES 4 (1982) (report to the U.S. Dep't of Labor).

[407] Several courts have cited the Sumner Simpson Papers as evidence of serious misconduct by Johns-Manville and other asbestos suppliers. *See, e.g.*, 727 F.2d at 530; 734 F.2d at 1039-40; 472 A.2d at 580-81.

[408] *See* text accompanying notes 409-11 *infra*.

[409] Seltzer, *supra* note 395, at 38 n.7.

[410] Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 669 (1981). For a detailed discussion concerning the lawsuits brought against DES manufacturers, see Comment, *Punitive Damages in DES Market Share Litigation*, 23 SANTA CLARA L. REV. 185 (1983).

[411] Seltzer, *supra* note 395, at 38 n.5.

[412] *E.g.*, 684 P.2d 187 (Dalkon Shield); 424 N.E.2d 568 (jeep roll bar); 638 S.W.2d 582 (automobile transmission).

large manufacturers. Smaller companies also are vulnerable to the financial effects of multiple punitive damage awards.[413] Obviously, not all product manufacturers face the prospect of bankruptcy from punitive damage awards. However, the experiences of those companies that have already been subjected to this risk should give advocates of punitive damages cause for concern.[414]

Moreover, the penalty imposed on a product manufacturer may still be excessive even though it falls short of corporate capital punishment.[415] Disproportionate punishment is virtually certain to occur because of the fragmented process by which courts assess punitive damages in products liability cases. When numerous victims receive punitive damages, punishment is not determined once and for all, as it is in a criminal proceeding, but instead is meted out on an incremental basis as each claimant recovers something.[416]

Theoretically, each jury should consider past, and possibly future, punitive damage recoveries when calculating the size of an individual award.[417] However, even if courts could tally a defendant's aggregate punitive liability, no mechanism exists for determining when the appropriate level of punishment has been reached. As Judge Friendly exclaimed in *Roginsky*: "Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, 'Hold, enough,' in the hope that others would follow."[418] This fragmented and essentially unsupervised method of awarding punitive damages in products lia-

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[413] Note, *supra* note 26, at 426; Note, *supra* note 4, at 68.

[414] Nevertheless, most courts remain skeptical about the seriousness of the overkill problem. *See, e.g.*, 734 F.2d at 1040-41; 717 F.2d at 838; 548 F. Supp. at 376-77; 515 F. Supp. at 109. A few courts, however, have acknowledged that multiple punitive damage awards can create financial problems for product manufacturers. *See, e.g.*, 727 F.2d at 526; 526 F. Supp. at 899.

[415] *See* notes 372-82 *supra* and accompanying text.

[416] J. GHIARDI & J. KIRCHER, *supra* note 21, § 5.40.

[417] *See* Unified School Dist. No. 490 v. Celotex Corp., 629 P.2d 196, 206 (Kan. Ct. App. 1981); State *ex rel.* Young v. Crookham, 618 P.2d 1268, 1273 (Or. 1980); MINN. STAT. ANN. § 549.20(3) (West Supp. 1981); OR. REV. STAT. § 30.925(3)(g) (1979); Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 213 (1978); RESTATEMENT (SECOND) OF TORTS § 908, comment e (1979).

[418] 378 F.2d at 839-40.

bility litigation does not constitute a principled method of imposing punishment.

6. *Other Fairness Considerations*

Allowance of punitive damage awards in products liability cases arguably offends other aspects of fairness. One concern is the double jeopardy or multiple punishment problem. This issue arises because each person injured by a defective product may seek punitive damages from the manufacturer.[419] If punitive damages are primarily retributive in nature, the manufacturer may claim that it is being punished more than once for the same wrongful act.[420] Sometimes product manufacturers have claimed that multiple punitive damage awards violated the constitutional prohibition against "double jeopardy."[421] The courts, however, have responded that protection against double jeopardy is limited to criminal and quasi-criminal proceedings.[422] Nevertheless, as one court pointed out, "A defendant in a civil action has a right to be protected against double recoveries not because they [sic] violate 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process."[423]

Unfortunately, other courts do not share this concern.[424] For example, an asbestos supplier raised the question of multiple punishment in *Neal v. Carey Canadian Mines, Ltd.*[425] The court,

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[419] Putz & Astiz, *supra* note 36, at 13. Under the doctrine of *Toole v. Richardson-Merrell, Inc.*, every claimant injured by the defendant's wrongful conduct may sue for both actual and punitive damages, even if punitive damages have previously been awarded to other claimants for the same wrongful act. *Id.* (citing *Toole*, 60 Cal. Rptr. 398).

[420] *See* Duffy, *supra* note 24, at 10; Tozer, *supra* note 47, at 304.

[421] Tozer, *supra* note 47, at 304. Punitive damages obviously create a form of double jeopardy in cases where criminal prosecution is also available. *See* Murphy v. Hobbs, 5 P. 119, 124-26 (Colo. 1884); Note, *supra* note 27, at 1041. However, the practice is generally held to be constitutional. *See* J. GHIARDI & J. KIRCHER, *supra* note 21, § 3.02; Comment, *supra* note 29, at 413-17. *See also* Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

[422] 734 F.2d at 1042; 684 P.2d at 217; *See* J. GHIARDI & J. KIRCHER, *supra* note 21, § 3.02.

[423] 526 F. Supp. at 899. *See In re* Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir.), *discretionary rev. denied*, 459 U.S. 988 (1982).

[424] *See, e.g.*, 548 F. Supp. 357.

[425] 548 F. Supp. 357, 377 (E.D. Pa. 1982).

however, declared that since the defendant owed a duty to each victim injured, each breach of duty constituted a separate wrongful act deserving punishment.[426] Thus, while multiple punishment may be unfair from a retributive standpoint, courts are likely to hold it constitutional.[427]

Product manufacturers also have asserted frequently that punitive damages, emphasizing wrongdoing, are inappropriate in a lawsuit where the defendant is held strictly liable for compensatory damages.[428] There are a number of dimensions to this argument. First, opponents of punitive damages claim that permitting the plaintiff to seek exemplary damages in a products liability suit is conceptually inconsistent.[429] A few courts have adopted this view.[430] For example, in *Walbrun v. Berkel, Inc.*,[431] the plaintiff sought punitive damages based on a claim of reckless disregard of his rights while also seeking compensatory damages on negligence and strict liability theories.[432] The court dismissed the punitive damages count, declaring that the recklessness allegation was not part of the underlying compensatory damage claim.[433] *Walbrun* is a minority view, however.[434] The prevailing view allows recovery of punitive damages if the plaintiff meets the requisite criteria for liability, regardless of the nature of the compensatory claim.[435]

A second and more sophisticated version of the incompatibility argument is that punitive damages frustrate the goals of

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[426] *Id.* at 377-78. *Compare* 548 F. Supp. 357 *with* 618 P.2d 1268 (The court discussed awarding punitive damages to each plaintiff injured by a company's defective product, but expressed no opinion.).

[427] Putz & Astiz, *supra* note 36, at 13. Note, *The Dubious Extension of Punitive Damage Recovery in Pennsylvania Products Liability Law*, 23 DUQ. L. REV. 681, 695 (1985). *See also* Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 705 (D. Md. 1981).

[428] *See, e.g.*, cases cited *infra* notes 431-35. *See also* Haskell, *supra* note 21, at 620.

[429] Ghiardi & Kircher, *supra* note 34, at 47-48; Haskell, *supra* note 21, at 618-20; Nelson, *supra* note 12, at 382; Sales, *supra* note 34, at 389.

[430] *See* notes 431, 434 *infra*.

[431] 433 F. Supp. 384 (E.D. Wis. 1976).

[432] *Id.*

[433] *Id.* at 385.

[434] *See* Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 705 (D. Md. 1981). *See also* note 435 *infra* and accompanying text.

[435] *See, e.g.*, 717 F.2d at 833; 548 F. Supp. at 378; Racer v. Utterman, 629 S.W.2d 387, 395-96 (Mo. Ct. App. 1981); 472 A.2d at 582-84; 294 N.W.2d at 441-42.

products liability.[436] A federal district court recently relied on this theory in *Gold v. Johns-Manville Sales Corp.*,[437] holding that a plaintiff could not seek punitive damages when predicating the underlying compensatory damage claim solely on strict liability in tort.[438] The court was concerned that spreading the cost of punitive awards to the public would undermine the resource allocation function of products liability.[439] Other courts, however, have disagreed with this analysis.[440] For example, the Colorado Supreme Court in *Palmer* declared that punitive damages complemented strict liability in achieving the social objectives of products liability.[441] The Alaska Supreme Court, in *Sturm*, reached the same conclusion.[442]

A third aspect of the incompatability issue is related to the fairness of the adjudicative process.[443] According to some commentators, mixing fault and no-fault issues in a single trial puts the defendant manufacturer at a serious disadvantage when defending the suit.[444] According to these critics, injecting punitive damages into products liability litigation prejudices the defendant's case in several ways. First, the "piggybacking" of a punitive damage claim onto a strict liability claim creates practical litigation problems for the defendant at trial.[445] For example, the pleadings contain vastly different allegations to support both fault based and no-fault theories of recovery.[446]

Mixing fault and no-fault concepts in a single suit also increases the chances of confusing the jury.[447] As the court in

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[436] *See* Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D.N.J. 1982). *But see* 684 P.2d 187; 594 P.2d 38.

[437] 553 F. Supp. 482 (D.N.J. 1982).

[438] *Id.* at 484-85.

[439] *Id.* at 484. The *Gold* decision was followed in *Wolf by Wolf v. Proctor & Gamble Co.*, 555 F. Supp. 613, 618 (D.N.J. 1982).

[440] *See, e.g.*, 594 P.2d 38; 684 P.2d 187.

[441] 684 P.2d at 218.

[442] 594 P.2d at 46-47.

[443] Fulton, *Punitive Damages in Product Liability Cases*, 15 FORUM 117, 128-32 (1979-80).

[444] *Id.*

[445] *Id.*

[446] *Id.*

[447] 553 F. Supp. at 485. *But cf.* Maxey v. Freightliner Corp., 450 F. Supp. 955, 962 (N.D. Tex. 1978), *aff'd*, 623 F.2d 395 (5th Cir. 1980).

Gold declared: "Punitive damages is clearly a negligence concept concerned with normative behavior. Its inclusion, I find, in a strict products liability suit would confuse the jury and undermine the goals of the cause of action."[448] On the other hand, the federal district court in *Maxey v. Freightliner Corp.*,[449] discounted this fear, pointing out that strict liability in tort is not entirely free of fault concepts.[450] The court stated,

> the risk of infecting a no-fault concept by simultaneous presentation of a fault based claim is exaggerated in a mind that fails to perceive that present formulation of strict liability grandly tosses fault out the front door but quietly brings much of it through the back door with language drawn from fault-riddled syntax.[451]

Finally, it is argued that the emphasis given to the manufacturer's misconduct as part of the punitive damages case inflames the jury and thereby improperly influences its decision on the compensatory damages issue.[452] As one commentator wrote: "Essentially, the product supplier is denuded of the usual safeguards imposed on discovery, the admission of evidence, the submission of issues, and defenses that traditionally govern simple negligence actions and then, in the same law suit, is subjected to an assault based on gross negligence (minus any safeguards)."[453] In addition, evidence of the defendant's wealth, which can be introduced as part of the punitive damages claim, may also prejudice the jury on the compensatory damages issue.[454]

7. *Evaluation of the Retribution Rationale*

Punitive damages in product liability cases are frequently imposed vicariously against innocent parties.[455] In addition, the

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[448] 553 F. Supp. at 485.

[449] 450 F. Supp. 955 (N.D. Tex. 1978).

[450] *Id.* at 962.

[451] *Id.*

[452] Nelson, *supra* note 12, at 389.

[453] Sales, *supra* note 34, at 390. Manufacturers have unsuccessfully made this argument in several cases. *See, e.g.*, 681 P.2d at 1064-65; 437 A.2d 700 at 705.

[454] Wheeler, *supra* note 373, at 291.

[455] *See* text accompanying notes 267-83 *supra*.

standards under which liability is determined and punitive awards are measured are vague.[456] Moreover, the cumulative effect of multiple punitive damage awards amounts to punishment that is disproportionate to the degree of wrongdoing.[457] Furthermore, the mixture of fault and no-fault concepts in a single product liability action places the defendant at an unfair disadvantage.[458] Consequently, we conclude that the use of punitive damages in such cases cannot be justified in terms of retributive goals. This does not mean that punitive damages do not have a sanctioning effect; it merely means that retribution cannot serve as a *raison d'etre* for the practice of assessing punitive damages against product manufacturers. Instead, one must consider whether deterrence or some other social purpose can justify punitive damages.

Nevertheless, we must emphasize that even though retributive principles provide no support for the imposition of punitive damages on product manufacturers, they are not irrelevant. Retributive principles still have a residual role—to act as an ethical constraint on policy measures, such as deterrence, that are based on utilitarian principles.[459] This issue will be addressed later.

B. The Compensation Function

Critics of punitive damages claim that exemplary awards constitute an undeserved windfall to the plaintiff.[460] In response to this allegation, proponents claim that punitive damages represent a form of additional compensation to an injured party.[461] As mentioned earlier, one of the earliest justifications given for punitive damages was that they represented compensation to the victim for injuries or expenses not included in a normal com-

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[456] *See* text accompanying notes 284-370 *supra*.

[457] *See* text accompanying notes 371-418 *supra*.

[458] *See* text accompanying notes 443-51 *supra*.

[459] *See* Schwartz, *supra* note 37, at 135. *See also* G. CALABRESI, THE COSTS OF ACCIDENTS 24-26 (1970).

[460] Long, *supra* note 24, at 886; Note, *supra* note 26, at 429. *See* Riewe v. McCormick, 9 N.W. at 89-90.

[461] Freifield, *supra* note 14, at 7.

pensatory award.[462] Even today, a few courts regard compensation as the sole basis for awarding punitive damages.[463]

The compensatory rationale for punitive damages assumes that awards of actual damages in tort actions do not provide full compensation to accident victims.[464] These injured parties "often suffer damage to emotional tranquility, family harmony and employment security that is particularly difficult to prove and generally not compensable anyway."[465] In addition, compensatory damages do not always reimburse litigants for the "enormous diligence, imagination and financial outlay required" to prove product manufacturers' wrongful conduct.[466] For example, in most states plaintiffs cannot recover attorneys' fees.[467] Ordinarily, a plaintiff spends at least one-third of his recovery on attorneys' fees.[468] Thus, verdicts that do not include an award of attorneys' fees usually leave the victim in worse financial condition than before his injury.[469]

Nevertheless, although punitive damages may incidentally compensate injured parties in some cases, it is difficult to accept compensation as a rationale for their imposition.[470] First, the liability standard focuses on the defendant's conduct, rather than the plaintiff's injury. This has nothing to do with compensation.[471] Moreover, the compensation rationale fails to explain why some injured parties will be "compensated," while other

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[462] *See* Brause v. Brause, 177 N.W. 65, 70 (Iowa 1920); Long, *supra* note 24, at 875; Comment, *supra* note 33, at 774-75.

[463] *E.g.*, Collens v. New Canaan Water Co., 234 A.2d 825, 831-32 (Conn. 1967); Westview Cemetery, Inc. v. Blanchard, 216 S.E.2d 776, 780-81 (Ga. 1975); Wise v. Daniel, 190 N.W. 746, 747 (Mich. 1922); Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 67 (N.H. 1972). *See* J. GHIARDI & J. KIRCHER, *supra* note 21, at § 4.02; Long, *supra* note 24, at 875.

[464] *See* J. GHIARDI & J. KIRCHER, *supra* note 21, at §§ 4.02-.06, 4.13; Long, *supra* note 24, at 875; Owen, *supra* note 33, at 1295-96.

[465] Owen, *supra* note 33, at 1298.

[466] *Id.* at 1325, *quoted in* Comment, *supra* note 410, at 194-95.

[467] *See* Note, *supra* note 380, at 153.

[468] Owen, *supra* note 33, at 1297. *See* Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 304-05 (1985) (criticizing Professor Owen's conclusion that punitive damages can be justified as a means of compensating victims for litigation costs).

[469] *Id.*

[470] Sales & Cole, *supra* note 5, at 1122.

[471] *Id.* at 1316-19.

equally deserving victims will not.[472] In addition, the size of the award seldom bears any resemblance to the plaintiff's uncompensated loss.[473] Although the jury may consider the extent of the plaintiff's harm, the jury may also consider the injury to society and the wealth of the defendant in determining the size of the punitive award.[474] Consequently, punitive damages only satisfy the need for additional compensation in a haphazard and irrational manner.

C. *The Law Enforcement Function*

Some courts and commentators have suggested that punitive damages serve a law enforcement function.[475] In other words, the prospect of punitive damages encourages private persons to enforce societal norms through civil litigation, thereby supplementing enforcement through the criminal process.[476] Some of these commentators have also claimed that the law enforcement rationale is applicable to products liability litigation.[477]

The law enforcement function is closely related to the deterrence function, and perhaps can be considered a part of it.[478] Without the opportunity to recover punitive damages, it would be economically impossible for a victim to bring a lawsuit in those cases in which actual damages would be minimal. Consequently, in those situations manufacturers would probably not be deterred from such wrongful conduct in the future.[479]

Some commentators also use the law enforcement theory to respond to the windfall argument.[480] According to the windfall argument, a plaintiff who has recovered compensatory damages

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[472] *Id.*

[473] *Id.* at 1319-25.

[474] RESTATEMENT (SECOND) OF TORTS § 908 comment e (1979).

[475] *See, e.g.*, State *ex rel.* Young v. Crookham, 618 P.2d at 1272; Morris, *supra* note 373, at 1183-88; Comment, *supra* note 33, at 776.

[476] D. DOBBS, *supra* note 296, § 3.9, at 205; Long, *supra* note 24, at 878; Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 525-26 (1956-57). *See* Note, *supra* note 8, at 439.

[477] Owen, *supra* note 33, at 1287-95; Note, *supra* note 15, at 330-31. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. at 383.

[478] Owen, *supra* note 33, at 1287. *See* Mallor & Roberts, *supra* note 47, at 649-50.

[479] Mallor & Roberts, *supra* note 47, at 650.

[480] Owen, *supra* note 33, at 1287.

has no further claim.[481] To the extent punitive damages reflect injury to society rather than the plaintiff, recovery of punitive damages by the plaintiff is an undeserved windfall.[482] In response, the proponents of punitive damages maintain that such awards not only serve as an inducement, but also as a reward for the plaintiff's important role as a "private attorney general."[483]

Although the law enforcement argument may be persuasive in cases where actual damages are likely to be small, the rationale has little force in products liability cases where compensatory damages usually are sufficient to justify the cost of litigation.[484] In fact, the threat of punitive damages may pressure manufacturers to settle dubious claims.[485]

D. The Deterrence Function

There is general agreement that punitive damages are supposed to deter both the defendant and others from engaging in proscribed conduct.[486] It is not so clear, however, that the deterrence rationale supports the imposition of punitive damages on product manufacturers. To resolve this question, two issues

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[481] *See generally* Morris, *supra* note 373, at 1206 (suggests that there is doubt about the "need for punishment beyond 'compensation' ").

[482] DuBois, *supra* note 38, at 350.

[483] Mallor & Roberts, *supra* note 47, at 650.

[484] *See* Tozer, *supra* note 47, at 303-04. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 302 (1985). *But see* Comment, *Class Actions in New York: Recovery for Personal Injury in Mass Tort Cases*, 30 SYRACUSE L. REV. 1187, 1200 n.107 (1978-79). *See generally* Long, *supra* note 24, at 889 (The author states that the "private attorney-general" rationale is "far-fetched.").

[485] DuBois, *supra* note 38, at 350. Sales & Cole, *supra* note 5, at 1156. *See* Maheu v. Hughes Tool Co., 384 F. Supp. 166, 170 (C.D. Cal. 1974), *aff'd in part, rev'd in part*, 569 F.2d 459 (9th Cir. 1977).

[486] *E.g.*, Moran v. Johns-Manville Sales Corp., 691 F.2d at 816; Sturm, Ruger & Co. v. Day, 594 P.2d at 47; Gryc *ex rel.* Gryc v. Dayton-Hudson Corp., 297 N.W.2d at 733; Thiry v. Armstrong World Indus., 661 P.2d at 517. *See* Ellis, *supra* note 37, at 8. Punitive damages, like criminal penalties, may be used to achieve either special or general deterrence. Special deterrence involves a sanction imposed to deter one who has committed a wrongful act from repeating the same act in the future. General deterrence, on the other hand, is directed at other potential wrongdoers to discourage commission of similar acts in the future. *See* G. CALABRESI, THE COSTS OF ACCIDENTS 22 n.4 (1970); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 949-54 (1966).

must be addressed: (1) Whether additional deterrent measures are needed in the products liability area, and (2) Assuming the need for deterrence exists, whether punitive damages are the most appropriate means of achieving this additional deterrent effect.

1. *The Relationship Between Retribution and Deterrence*

As mentioned earlier, retribution is grounded in ethical considerations of fairness and desert.[487] Deterrence, on the other hand, largely is utilitarian in orientation.[488] Thus, when examining punitive damages from a retributive standpoint one asks, "Is it fair?" But when analyzing punitive damages in terms of deterrence one asks, "Does it work?"[489] Deterrence probably offers more leeway as a rationale than retribution, but each is subject to constraints.[490] In the case of retribution, fairness and desert delimit the proper scope of punitive sanctions; when deterrence is invoked as a justification, the concept of efficiency functions in a similar manner.[491]

Thus, when the deterrence rationale is invoked, one must consider "whether the costs incurred by imposing a detriment on a defendant will be offset by a reduction in the expected losses to society from future harmful acts."[492] Moreover, the level of deterrence should be "optimal."[493] Therefore, "overdeterrence," in the sense of excessive deterrent measures, should be avoided to prevent discouraging appropriate conduct.[494] Efficiency operates in yet another way in this area: when a number of measures are

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[487] Ellis, *supra* note 37, at 6-8.

[488] *Id.* at 8-10.

[489] *See id.* at 6-10; Note, *Punitive Damages in California: The Drunken Driver*, 36 HASTINGS L.J. 793, 801 (1985).

[490] *See* Schwartz, *supra* note 37, at 135.

[491] Ellis, *supra* note 37, at 6-10; Schwartz, *supra* note 37, at 135. Efficiency is a concept that pervades the law of torts. For example, many commentators claim that the reasonableness formula used in the law of negligence requires that risks and benefits be balanced in a way promoting an efficient allocation of resources. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1057 (1972); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972); Schwartz, *Forward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 464 n.181 (1979).

[492] Ellis, *supra* note 37, at 8.

[493] Schwartz, *supra* note 37, at 135.

[494] *Id.* at 135 & n.9.

available to achieve a given deterrent effect, efficiency dictates choosing the most cost-effective technique.[495]

Many of the issues examined previously in connection with retribution are also relevant to deterrence. The difference between retributive and deterrent perspectives is illustrated by analyzing vicarious liability. From a retributive standpoint, the imposition of punitive damages through vicarious liability raises the major concern that innocent parties are punished when juries assess such damages against product manufacturers. On the other hand, from the perspective of deterrence, vicarious liability focuses on whether those punished can influence the actual wrongdoers.

Likewise, because it violates the principle of fair notice, the vague liability standard associated with punitive damages is undesirable from a retributive standpoint. However, this standard is also deficient in terms of deterrence. Under the existing standard, it is difficult for the manufacturer to know when to alter business practices. Consequently, deterrence goals are not achieved. Likewise, just as disproportionate punishment from a retributive standpoint violates the principle of just desert, it also results in "overdeterrence" by inducing manufacturers to forego legitimate activities in order to avoid the risk of economic Armageddon. This results in an excessive allocation of societal resources to accidental cost prevention.

2. *The Need for Additional Deterrence*

Some commentators maintain that punitive damages are unneeded because state and federal regulations govern product quality.[496] The threat of civil or criminal penalties for violation of regulatory standards supposedly deters manufacturers from conducting themselves in a manner for which punitive damages can be awarded.[497] Ford Motor Company made this argument

[495] For example, if a civil penalty or a prison sentence were equally effective at deterring a particular type of conduct, the civil remedy will probably involve fewer costs. The cost of enforcement would probably be less, and the detrimental effects on third parties such as family members (in terms of stigmatization, loss of economic support, and the like) would also probably be less severe. Therefore, it would not be cost-effective to choose a criminal penalty over a civil penalty in these circumstances.

[496] Comment, *supra* note 33, at 783. *See* text accompanying notes 497-500 *infra*.

[497] Comment, *supra* note 33, 783; Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 840-41. *See* Tozer, *supra* note 47, at 304.

in *Wangen*, calling for the abolition of punitive damages.[498] However, the court observed that all manufacturers were not subject to the same degree of regulation as the automobile industry.[499] Moreover, Ford's argument assumed that the government would actively search for violators and enforce regulations when, in reality, economic, political, and practical restraints hinder enforcement by governmental agencies.[500]

Ford Motor Company also claimed in *Wangen* that compensatory damages alone were sufficient to achieve an appropriate level of deterrence.[501] The court, however, rejected Ford's contention, observing, "Some may think it cheaper to pay damages or a forfeiture than to change a business practice."[502] *Wangen* expressly relied on *Funk v. H.S. Kerbaugh, Inc.*,[503] for this proposition.[504] In *Funk*, the defendant, while engaged in construction work for a railroad, carried out blasting operations in such a way as to damage buildings belonging to the plaintiff "because it was cheaper to pay damages . . . than do the work in a different way."[505] The *Funk* court imposed punitive damages on the defendant to discourage such thinking in the future. Apparently, the court felt that the defendant should not be allowed to invade the plaintiff's interest even if willing to pay damages.[506]

With *Funk* in mind, the *Wangen* court declared, "The possibility of the manufacturer paying out more than compensatory damages might very well deter those who would consciously engage in wrongful practices and who would set aside a certain amount of money to compensate the injured consumer."[507] *Wan-*

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[498] Wangen v. Ford Motor Co., 294 N.W.2d at 451.

[499] *Id.*

[500] Comment, *supra* note 33, at 783.

[501] 294 N.W.2d at 451. For other cases in which the defendant company argues that compensatory damages are an adequate deterrent, see 378 F.2d at 841; Gryc v. Dayton-Hudson Corp., 297 N.W.2d at 741. *See also* Coccia & Morrissey, *supra* note 45, at 50.

[502] 294 N.W.2d at 451.

[503] 70 A. 953, 954 (Pa. 1908).

[504] 294 N.W.2d at 451.

[505] 70 A. at 954.

[506] The interest invaded might be classified in Calabresian terms as one protected by a property rule. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

[507] 294 N.W. 2d at 451.

gen's reliance on the blasting case analogy raises two distinct issues. The first issue is whether compensatory damages are sufficient to achieve the goals of products liability law. The second issue is whether punitive damages are a suitable mechanism for accomplishing these goals.

3. *Compensatory Damages and Deterrence*

It is assumed that compensatory damages are normally sufficient to promote efficient levels of deterrence.[508] Accordingly, deterrence goals justify imposing punitive damages only where compensatory damages alone result in less than optimal deterrence.[509] A number of courts and commentators have concluded, however, that compensatory damages do not sufficiently discourage product manufacturers from engaging in undesirable conduct.[510]

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[508] Ellis, *supra* note 37, at 9.

[509] *Id.* Market deterrence uses the free market to determine an appropriate level of safety or accident cost avoidance, based on what consumers are willing to pay. *See generally* G. CALABRESI, *supra* note 486, at 68-94. The ultimate goal of market deterrence is not to achieve the maximum degree of safety that is technologically possible, but rather to establish an "optimum" balance between safety costs and accident costs. The concept of economic efficiency determines this optimum balance.

Efficiency is achieved when economic resources are exploited to maximize human satisfaction, as measured by consumer willingness to pay. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 4 (1972). *See also* McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 24-42 (1970); Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 119-36 (1979). If market transactions are used to achieve an efficient allocation of economic resources, however, the prices of goods must reflect their true costs, including the social costs of injuries. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 502 (1961). As Professor Calabresi points out: "Failure to include accident costs in the prices of activities will, according to the theory, cause people to choose more accident prone activities than they would if the prices of these activities made them pay for these accident costs, resulting in more accident costs than we want." G. CALABRESI, *supra* note 486, at 70. Consequently, the costs of injuries should be placed on the party that is more likely to cause this cost to be reflected in the price of the product. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 505 (1961). In the case of products, the manufacturer usually is considered the party upon whom this liability should be placed. Strict liability in tort accomplishes this objective.

[510] *See, e.g.*, Acosta v. Honda Motor Co., 717 F.2d at 836-37; Campus Sweater & Sportswear v. M.B. Kahn Constr. Co., 515 F. Supp. at 107; Grimshaw v. Ford Motor Co., 174 Cal. Rptr. at 382; Robinson & Kane, *supra* note 15, at 142; Comment, *supra* note 33, at 782-83.

According to these observers, compensatory damage awards do not provide sufficient deterrence because the aggregate amount of compensatory damages assessed against a manufacturer does not always reflect the full cost to society of the injuries caused by defective products. For example, some victims might not sue because they were unwilling to undergo the emotional and financial stress of a lawsuit.[511] Other victims might not recover because they are unable to meet their burden of proof or because the manufacturer can successfully raise affirmative defenses.[512] Finally, under the existing liability rules, many of the social costs which fall on third parties are not compensable.[513]

Of course, deterrence does not necessarily require that all harm caused by the marketing of defective products be compensated. Presumably, a product manufacturer will be deterred from engaging in a particular course of conduct when the cost of paying damage claims exceeds the benefits of that conduct. Thus, for example, a product manufacturer whose conduct generates $1,000 in benefits, will discontinue that conduct when the liability costs to it reach $1,000, regardless of whether the actual detriment to others is $1,000 or $10,000. Nevertheless, the less compensatory damages reflect the full social cost of an activity, the less they are likely to deter undesirable conduct.

4. *Punitive Damages and Deterrence Goals*

Assuming that compensatory damages do not adequately force product manufacturers to internalize the cost of consumer injuries caused by defective products, can punitive damages be used as a supplement to compensatory awards to achieve an optimal level of deterrence? In the author's opinion, punitive damages are inappropriate for this purpose for several reasons.

First, if compensatory damage rules fail to provide full compensation to accident victims and thereby frustrate deterrence goals, the better response should be to reform compensatory damage principles directly instead of trying to remedy deficien-

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[511] *See* 717 F.2d at 837; Robinson & Kane, *supra* note 15, at 142.

[512] *See* 717 F.2d at 837.

[513] *See id.*; Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 113 (1982-83).

cies through the use of punitive damages.[514] For example, courts could allow successful plaintiffs to recover their attorneys' fees in product liability actions. As to the underdeterrence that occurs because some victims either do not sue or are unable to prevail at trial, the solution might lie in relaxing some of the barriers that create proof problems for victims in product injury cases.[515]

The second objection to using punitive damages as a surrogate for compensatory damages is that the focus of punitive damages is too narrow. As pointed out in the discussion of the liability formula, exemplary damages have not, and should not, be awarded in every instance where the product manufacturer puts a defective product on the market.[516] Rather, courts should reserve this sanction for conduct that is highly culpable. The court in *Palmer* noted this distinction:

> Most manufacturers, both from a desire to avoid liability and from a generalized sense of social responsibility, use their resources to prevent the marketing of hazardous products. To remedy the injuries resulting when a defective product is nevertheless marketed, section 402A imposes liability on the manufacturer without regard to fault. The principles of strict liability, however, are ill equipped to deal with problems at the other end of the culpability scale, that is, when an injury results from the marketing of a product in flagrant disregard of consumer safety. . . . A legal tool calculated "to expose this type of gross misconduct, punish those manufacturers [engaging in] such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare" is therefore needed to fill this legal void. . . . The remedy of punitive damages is tailor-made to fill this need.[517]

The *Palmer* court's remarks were meant to show that punitive damages complemented compensatory damages in promoting the

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[514] *See* Schwartz, *supra* note 37, at 139-40.

[515] For example, the California Supreme Court in Barker v. Lull Engineering Co., 573 P.2d 443, 455 (Cal. 1978), shifted the burden of proof on the issue of defect from the plaintiff to the defendant. According to the court, once the plaintiff makes a prima facie showing that the product's design proximately caused the injury, the burden shifts to the defendant manufacturer to prove, in light of the relevant risk-utility criteria, that the product was not defective. *Id.*

[516] *See* Owen, *supra* note 33, at 1367.

[517] Palmer v. A.H. Robins Co., 684 P.2d at 218 (quoting Owen, *supra* note 33, at 1259-60).

goals of products liability law, but the court implicitly acknowledged that punitive damages, with their emphasis on culpable conduct, could not act as an all-purpose substitute for compensatory damages. It is essential to keep this point in mind. To the extent that punitive damages serve any deterrent purpose, they should be limited to deterring the narrow categories of culpable conduct for which quasi-penal sanctions are considered appropriate.

Another difficulty with punitive damages is that they are designed to promote retribution and other purposes as well as deterrence. While these goals are not necessarily inconsistent,[518] they do not always complement each other. Consequently, rules directed toward retributive or other objectives sometimes undermine the potential deterrent effect of punitive damages. The rules relating to liability and assessment of damages illustrate this problem.

For example, the deterrent effect of punitive sanctions decreases when some wrongdoers are not subject to liability. Yet this occurs in many states when the victim dies as the result of the defendant's culpable conduct.[519] Currently, thirty-one states do not permit recovery of punitive damages in wrongful death actions.[520] The rationale for this curious rule is that wrongful death statutes are solely intended to compensate the next of kin for economic loss suffered as the result of the victim's death.[521] In effect, the compensatory objectives of wrongful death legislation are deemed to outweigh the deterrent purposes of punitive damages. Consequently, product manufacturers who kill people are not deterred by punitive damages.

The situation is somewhat similar where the defendant manufacturer's misconduct causes property damage, but no physical

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[518] *See, e.g.*, Note, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 PAC. L.J. 1273, 1279 (1982).

[519] *See* Schwartz, *supra* note 37, at 142-43.

[520] *See* Note, *Constitutional Law—Wrongful Death*, 8 CUM. L. REV. 567, 574 (1978).

[521] *See, e.g., id.* at 575-76. *But see* ALA. CODE § 6-5-410 (1975) (wrongful death statute allows only punitive damages to be recovered). *See also* Eich v. Town of Gulf Shores, 300 So. 2d 354 (Ala. 1973).

injury. At least some courts refuse to allow punitive damages to be imposed in such cases.[522]

Punitive damages, for example, were denied in *Eisert v. Greenberg Roofing & Sheet Metal Co.*[523] The defendant in *Eisert* sold flammable insulation material and paint, which the defendant claimed was "self-extinguishing" and "fire retardant," to a school district. The material allowed a fire originating in a school automobile body shop to spread, killing several students and causing property damage to the building.[524] After suit was filed, the school district sought to amend its complaint to add a claim for punitive damages,[525] but the trial court denied the motion. On appeal, the Minnesota Supreme Court declared that the property interest involved was not sufficient to justify the extension of punitive damages into strict liability actions of this sort.[526]

The court's conclusion is difficult to justify, at least in terms of deterrence: If the defendant's conduct poses a sufficient threat to human safety to justify deterrent measures, why should the sanction be withheld simply because a particular type of harm did not occur? In any event, the deterrent of punitive damages is considerably weakened because some courts will not allow them to be imposed in situations where the product manufacturer's culpable conduct caused one type of harm (property damages) instead of another (personal injury).

The standards for determining the size of punitive damage awards are also inconsistent with deterrence objectives.[527] According to the Restatement (Second) of Torts, when a jury assesses punitive damages it may consider: (l) the character of

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[522] Of the small number of courts that have addressed this issue, one upheld an award of punitive damages. Art Hill Ford, Inc. v. Callender, 423 N.E.2d 601 (Ind. 1981) (repeated failure to repair defective automobile). Another court allowed assessment of punitive damages but reduced the size of the award because the product did not subject the consumer to a risk of physical harm. In Slough v. J.I. Case Co., 650 P.2d 729 (Kan. 1982), the defendant knowingly marketed a trencher with a defective axle and failed to inform dealers or customers of the problem. A punitive award of $350,000 was reduced to $150,000.

[523] 314 N.W.2d 226 (Minn. 1982).

[524] *Id.* at 227.

[525] *Id.* at 228. (The state wrongful death act prohibited the beneficiaries of the students who were killed by the fire from recovering punitive damages.).

[526] *Id.* at 229.

[527] *See* Schwartz, *supra* note 37, at 140-41.

the defendant's act, (2) the nature and extent of the harm the defendant caused, or intended to cause, to the plaintiff, and (3) the wealth of the defendant.[528] However, none of these elements is clearly relevant to the achievement of an appropriate level of deterrence.

The first consideration—the character of the defendant's act—relates to motivation or state of mind, and is more relevant to retribution than to deterrence. Under the theory of desert, the character of the defendant's act is significant because the more culpable his behavior, the more punishment he deserves. As mentioned earlier, the only state of mind existing in products liability cases is a fictitious state of mind imputed to the corporation.

The second element, the nature and extent of harm, is more germane to deterrence goals. However, the courts do not treat this factor consistently in design defect cases. Some courts state that the jury should consider the harm suffered by the individual plaintiff only and not any additional harm suffered by other members of the public. Other courts have allowed the jury to take into account not only the harm suffered by the individual plaintiff, but also the injury actually or potentially incurred by the general public.[529]

Thus, the federal district court in *Hoffman v. Sterling Drug, Inc.*[530] excluded evidence of injuries to other persons from the defective product, the drug Aralen.[531] The court also ruled that the plaintiff could not ask the jury to punish the defendant for injuries caused to other Aralen users. The court declared:

> Applying the plaintiff's rationale, each injured consumer of Aralen, using identical evidence regarding testing, notice, etc., could individually recover on behalf of "society" to punish

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[528] RESTATEMENT (SECOND) OF TORTS § 908 (1979). *See also* Note, *supra* note 8, at 443.

[529] *See, e.g.*, 174 Cal. Rptr. at 388 ("Unlike malicious conduct directed toward a specific individual, Ford's tortious conduct endangered the lives of thousands of Pinto purchasers."); 297 N.W.2d at 741 ("The evidence shows that Riegel created a substantial danger to the public by marketing its highly flammable cotton flannelette."). *See also* Putz & Astiz, *supra* note 36, at 13; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 287-88 (1983).

[530] 374 F. Supp. 850 (M.D. Pa. 1974).

[531] *Id.* at 857.

> the affront. Such a result would be ludicrous. Instead, we view the law to be that each Aralen consumer showing a bona fide injury may, if the evidence warrants, collect his reasonable proportion of punitive damages the defendant owes to "society."[532]

This approach, if literally applied, would result in undeterrence unless each member of society injured by the manufacturer's misconduct actually brought suit and recovered his or her pro rata amount of punitive damages.

The opposing view is illustrated by cases like *Grimshaw* and *Gryc* where the court allowed the jury to consider potential injuries to others in assessing the punitive award.[533] This approach, however, leads to overdeterrence where numerous suits arise out of the same course of conduct. This is because each plaintiff will claim damages not only for himself, but also for other members of the public, including potential litigants. Thus, injury to the public will be assessed against the manufacturer not once, but many times.

A third factor to be considered in calculating punitive damages is the wealth of the defendant. Once again, this consideration, if it is relevant to anything, is more appropriate to the goal of retribution than to the achievement of deterrence. If one subscribes to the diminishing utility theory of money,[534] it is arguable that, to achieve a uniform degree of punishment, the size of the penalty assessed should vary according to the wealth of the wrongdoer. This principle, however, does not carry over to deterrence, particularly where the wrongful conduct is economically motivated.[535] Thus, a $1000 penalty should deter some-

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[532] *Id. See also* Owen, *supra* note 42, at 51 n.243. *But see* Seltzer, *supra* note 395, at 58. Professor Seltzer contends that a jury cannot properly award a proportionate share of the appropriate total of punitive damages deserved by the defendant before first determining what the aggregate awards to all injured persons should be. *Id.*

[533] *See* note 529 *supra* and accompanying text.

[534] For a discussion of this theory, see G. CALABRESI, *supra* note 486, at 39-40. *See also* Blum & Kalven, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 455-57 (1952).

[535] *See* Schwartz, *supra* note 37, at 140. Professor Schwartz points out that, if the diminishing utility of money reduces the real cost of punishment for a wealthy person, then it also reduces the cost of complying with the required legal norm to avoid liability. *Id.*

one from committing a wrongful act that will gain him less than $1000 (assuming a 100 percent chance of getting caught), whether the wrongdoer is rich or poor.[536]

Finally, some states also require that the size of the punitive damage award bear a reasonable relation to the amount of compensatory damages allowed.[537] But, as a number of commentators have noted, there is no obvious correlation between the optimum penalty required for deterrence and some multiple of the actual damages suffered by a particular plaintiff.[538] Consequently, this rule does nothing to promote deterrence goals.

5. *Punitive Damages as a Deterrent to Manufacturer Misconduct*

Despite the problems discussed above, there is still considerable support for the proposition that punitive damages can be an effective deterrent against certain flagrant forms of product manufacturer misbehavior.[539] Perhaps this is true, but a number of conditions must be met before punitive damages can operate as a deterrent in even this limited sense. First, the potential wrongdoer must know what sort of conduct is prohibited and what the potential penalty for violation will be.[540] Second, the economic effect of the sanction must fall on the potential wrongdoer or on

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[536] *Cf.* Ellis, *supra* note 37, at 32-33. An exception is where the emotional satisfaction gained by the defendant from his wrongful act exceeds the detriment imposed upon him by society. Business entities such as product manufacturers are not likely to be motivated by such noneconomic factors, however.

[537] *See, e.g.*, Schroeder v. Auto Driveway Co., 523 P.2d 662, 672 (Cal. 1974); Adair v. Huffman, 195 S.E.2d 739, 743-44 (W. Va. 1973); Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823, 832 (1978).

[538] *See* Ellis, *supra* note 37, at 59-60; Comment, *supra* note 241, at 649-50.

[539] *See, e.g.*, 594 P.2d at 47; 297 N.W.2d at 741; Thiry v. Armstrong World Indus., 661 P.2d 515, 517-18; Ingoe, *Punitive Damages in Products Liability Cases Should be Allowed*, 22 TRIAL LAW. GUIDE 24, 29 (1978); Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613, 625-26 (1972); Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303, 328 (1980).

[540] Punitive damages are often attacked as being violative of constitutional due process because juries have only a vague standard by which to determine liability. *See, e.g.*, 594 P.2d at 47 (punitive damages not void for vagueness). *See generally* J. GHIARDI & J. KIRCHER, *supra* note 21, at § 6.06.

someone who can control the wrongdoer.[541] Finally, the target of these punitive measures must be able to alter its conduct.[542]

The first condition, knowledge of the prohibited conduct, relates to the clarity of the liability standard, an issue discussed earlier in connection with the retribution rationale. Just as it is unfair to punish a product manufacturer who has not been given clear notice of the proscribed conduct, so it is pointless from the standpoint of deterrence to impose a detriment without first indicating what conduct the sanction is supposed to discourage.[543] As concluded in the previous discussion, the various liability formulas provide little guidance except in the case of obvious wrongdoing. In addition, the manufacturer has no way of calculating the cumulative amount of punitive damages that will be assessed against it if it engages in proscribed conduct.[544]

The second condition, effective economic sanction of the wrongdoer, also presents difficulties. To accomplish its purpose, any detriment, whether imposed as a punishment or as a deterrent, must ultimately affect the potential wrongdoer. Thus, pu-

[541] *See* notes 266-83 *supra* and accompanying text. *See generally* J. GHIARDI & J. KIRCHER, *supra* note 21, at § 6.10; Owen, *supra* note 33, at 1300-01.

[542] Owen, *supra* note 33, at 1283.

[543] *See, e.g.*, 661 P.2d at 517.

[544] *See* notes 373-454 *supra* and accompanying text. The theory of deterrence assumes that a potential wrongdoer will weigh the benefits and costs that may result from his actions. This is particularly true where the potential wrongdoer is a business enterprise motivated primarily by economic considerations. Consequently, to achieve deterrence it is useful, if not essential, that the wrongdoer know in advance the size of any punitive damage award that may be assessed against him. Wheeler, *supra* note 529, at 306. However, the vagueness of the rules governing assessment of damages, coupled with the broad scope of jury discretion in applying these rules, makes it extremely difficult for product manufacturers to estimate their potential punitive damage liability. This uncertainty casts considerable doubt on the deterrent value of punitive damages. Schwartz, *supra* note 37, at 141. Not everyone agrees, however, that uncertainty as to the extent of punitive damage liability undermines the deterrent effect of punitive awards. The Colorado Supreme Court in *Palmer v. A.H. Robins Co.* declared that this type of uncertainty actually enhanced the deterrent effect of punitive damages. The court declared:

> Indeed, one virtue of Colorado's statutory remedy of punitive damages is that, from a deterrent standpoint, the precise magnitude of cost of the offending party is impossible to project. This uncertainty of cost will undoubtedly affect a manufacturer's decision to introduce a product in the marketplace. If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other product costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctible defect.

684 P.2d at 218.

nitive damages will have little deterrent effect if the product manufacturer is able to pass on the cost of such awards,[545] or the cost of insuring against them, to the public in the form of higher prices.[546] As the *Wangen* court observed, a product manufacturer's ability to treat punitive damages as a cost of doing business depends on its market situation.[547] Obviously many manufacturers will not be able to shift these costs onto the public. Some manufacturers, however, by virtue of their competitive positions, can raise prices without losing business.[548] In addition, as one commentator pointed out, the practice of multiple business ownership within parent companies sometimes enables costs to be spread among unrelated corporate divisions.[549]

Even when the product manufacturer is unable to shift the cost of punitive damage awards onto consumers, the ultimate effect of punitive sanctions falls on the company's shareholders.[550] Since shareholders are not guilty of any misconduct, the only justification for imposing a detriment on shareholders is their supposed ability to influence the behavior of the actual wrongdoers.[551] Proponents of punitive damages claim that shareholders, particularly institutional shareholders, "will not idly endure what amounts to corporate mismanagement."[552] Shareholder control over corporate management is likely to vary con-

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[545] *See* Haskell, *supra* note 21, at 612. In addition, shifting losses from punitive damage awards from the manufacturer to consumers would result in a misallocation of resources if the total amount of these awards exceeded the cost to society of the risk caused by the manufacturer's conduct. *See* Gold v. Johns-Manville Sales Corp., 553 F. Supp. at 484.

[546] *See* Ghiardi & Koehn, *supra* note 256, at 251; Comment, *supra* note 45, at 371-72.

[547] *See* 294 N.W.2d at 452. *See also* Ghiardi & Kircher, *supra* note 34, at 37-40; Comment, *supra* note 33, at 783-84.

[548] *See generally* J. GHIARDI & J. KIRCHER, *supra* note 21, at § 6.12; Owen, *supra* note 33, at 1292-94; Comment, *supra* note 22, at 907. Note, *The Dubious Extension of Punitive Damage Recovery in Pennsylvania Products Liability Law*, 23 DUQ. L. REV. 681, 697 (1985).

[549] *See* Ghiardi & Kircher, *supra* note 34, at 27.

[550] *See* 294 N.W.2d at 453-54; Note, *supra* note 266, at 1306-08.

[551] *See* 294 N.W.2d at 453-54 ("There is a public interest to encourage shareholders and corporate management to exercise closer control over the operation of the entity, and the imposition of punitive damages may serve this interest.").

[552] *See* Parlee, *Vicarious Liability for Punitive Damages: Suggested Change in the Law Through Policy Analysis*, 68 MARQ. L. REV. 27, 51 (1984); Robinson & Kane, *supra* note 15, at 143.

siderably from company to company, however, and in many cases will be insufficient to affect daily management decisions. Thus, imposing punitive damages on product manufacturers will often be nothing more than a futile gesture.[553]

The third condition for deterrence is that the product manufacturer be capable of altering its conduct to avoid imposition of punitive damages. Assuming that, due to pressure from shareholders, upper level corporate management desires to avoid subjecting the company to punitive damage liability, can management respond in an effective way? Product development and marketing decisions frequently are made in a splintered, decentralized manner involving contributions from persons at all levels of management.[554] Arguably, this diffusion of decision making responsibility within the corporation makes it difficult for a product manufacturer to alter its conduct.

This is not to say that nothing can be done about the corporate decision making process. For example, management could learn all of a particular decision's ramifications by including specialists from each discipline in high-level decision making.[555] Management could also discourage a "profit-at-all-cost" mentality on the part of its employees. In addition, the company should provide channels for receiving and analyzing reports of injuries and field failures of its products. Finally, management should be prepared to take immediate corrective action when the occurrence of injuries becomes apparent.[556] Nevertheless, the ability of product manufacturers to respond to legal sanctions in this way is likely to vary according to the size of the company and the character of its management structure.

6. *The Social Costs of Punitive Damages*

Even assuming that punitive damages have some deterrent effect on product manufacturers, one must consider whether the

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[553] *But see* Pease v. Beech Aircraft Corp., 113 Cal. Rptr. 416, 427 (1974).

[554] *See* Owen, *supra* note 42, at 15; Owen, *supra* note 33, at 1306.

[555] *See* Note, *supra* note 8, at 452-53.

[556] *See id.*; Drayton v. Jiffee Chemical Corp., 395 F. Supp. 1081, 1098 (N.D. Ohio 1975), *aff'd*, 591 F.2d 352 (6th Cir. 1978); Owen, *supra* note 33, at 1316. *See also* text accompanying notes 366-69 *supra*.

social gains realized from deterring unwanted conduct outweigh the social costs necessary to achieve them.[557] If punitive damages are not "cost effective" as a deterrent, then one cannot rely on deterrence as a rationale for utilizing punitive damages in the products liability area.

Perhaps the most significant social cost of punitive damages comes from overdeterrence. As stated earlier,[558] overdeterrence is undesirable, particularly when it discourages legitimate, economically productive conduct. Although some assert that overdeterrence does not occur when punitive damages are imposed on product manufacturers,[559] given the present structure of the punitive damages regime, some overdeterrence is inevitable. The real issue, therefore, is whether the prospect of overdeterrence is substantial enough to militate against the use of punitive damages for deterrence in the products liability area.

One aspect of the overdeterrence problem is the imposition of a greater detriment than is necessary to discourage unwanted behavior. As discussed earlier, the rules that govern the assessment of punitive damages are not particularly oriented toward deterrence goals.[560] Obviously, plaintiffs and their attorneys have no incentive to limit deterrence to an optimal amount; their main concern is to obtain the highest award possible.[561] Moreover, the vagueness of the criteria for determining the size of punitive damage awards, coupled with the lack of effective judicial control, encourages juries to act out of passion or prejudice.[562] This makes it unlikely that jury verdicts will consistently promote deterrence goals. Finally, the assessment of punitive damages in numerous individual suits results in aggregate liability that is excessive in terms of deterrence objectives.

The imposition of excessive liability creates its own social costs, particularly if product manufacturers are seriously harmed by multiple punitive damage awards. In the earlier consideration of the overkill problem as an aspect of disproportionate punish-

[557] *See* Ellis, *supra* note 37, at 8-9.

[558] *See* text accompanying note 494 *supra.*

[559] *See* Note, *supra* note 15, at 340-41.

[560] *See* text accompanying notes 514-38 *supra.*

[561] *See* Wheeler, *supra* note 373, at 307.

[562] *See* Ghiardi, *Should Punitive Damages be Abolished?—A Statement for the Affirmative*, 1965 ABA SECTION OF INS., NEGLIGENCE AND COMPENSATION LAW 282, 287.

ment,[563] it was concluded that punitive damage assessments would financially ruin some companies. As pointed out, shareholders would not be the only parties to suffer if a product manufacturer were forced into bankruptcy.[564] The bankruptcy would also harm creditors, employees, and suppliers.[565] In addition, future accident victims might be deprived of a chance to recover for their injuries,[566] and the loss of competition could harm the public.[567]

Overdeterrence also occurs when product manufacturers are discouraged from engaging in legitimate conduct. Cost-benefit analysis, a process essential to product design,[568] is one such activity. Arguably, the imposition of punitive damages on product manufacturers inhibits certain types of cost-benefit decisions and thereby undermines the accident cost reduction function of products liability law.

Accident cost reduction is one of the principal reasons for imposing strict liability on product manufacturers.[569] As early as

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[563] *See* text accompanying notes 380-82 *supra*.

[564] *See* text accompanying notes 280-83 *supra*.

[565] *See* Coffee, *supra* note 280, at 401; DuBois, *supra* note 38, at 349.

[566] *See* Long, *supra* note 24, at 887; Comment, *supra* note 7, at 677-78.

[567] *See* Note, *supra* note 4, at 68-69.

[568] *See* Owen, *supra* note 42, at 24.

[569] *See* Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 548 (N.J. 1982); Suter v. San Angelo Foundry & Machine Co., 406 A.2d 140, 151-52 (N.J. 1979). Accident cost avoidance, however, is not the only rationale for strict products liability. Risk distribution, for example, is another important goal. As the New Jersey Supreme Court declared, "[S]preading the costs of injuries among all those who produce, distribute and purchase manufactured products is far preferable to imposing it on innocent victims who suffer illness and disability from defective products. This basic normative premise is at the center of our strict liability rules." 447 A.2d at 547. *See also* Ray v. Alad Corp., 560 P.2d 3, 8 (Cal. 1977); Price v. Shell Oil Co., 466 P.2d 722, 726 (Cal. 1970); Greenman v. Yuba Power Prod., 377 P.2d 897, 901 (Cal. 1962); Calabresi, *supra* note 509, at 517-27; Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966). RESTATEMENT (SECOND) OF TORTS § 402A comment c (1977).

Some courts and commentators have espoused a representational theory of liability. Under this approach, strict liability in tort is justified because manufacturers possess superior knowledge and skill, induce consumer reliance on their judgment through advertising, and expressly or impliedly represent their products to be safe. See Phipps v. General Motors Corp., 363 A.2d 955 (Md. 1976); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661, 688; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1123 (1960); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment*, 60 VA.

1944, Justice Traynor of the California Supreme Court declared that "public policy demands that responsibility be fixed wherever it will effectively reduce the hazards to life and health inherent in defective products that reach the market."[570] Without such liability, only competitive forces and state regulation would restrain product manufacturers as to the level of risk they imposed on consumers.[571] Strict liability, however, by forcing manufacturers to internalize the costs of product injuries, creates an economic incentive on the part of manufacturers to discover and reduce the risks associated with their products when it is reasonable to do so.[572]

This does not mean that product manufacturers are expected to prevent consumer injuries at any cost; rather manufacturers are encouraged to achieve that degree of product safety that is economically efficient. In the words of Professor Calabresi:

> A manufacturer is free to employ a process even if it occasionally kills or maims if he is able to show that consumers want his product badly enough to enable him to compensate those he injures and still make a profit. Economists would say that except in those few areas of collective decision, this is the best way to decide if the activity is worth having.[573]

L. REV. 1111 (1974).

Finally, strict liability is sometimes justified as a means of enabling injured consumers to overcome the procedural and practical difficulties of proving negligence on the part of the product manufacturer or seller. *See* Lechuga, Inc. v. Montgomery, 467 P.2d 256, 262 (Ariz. App. 1970); Barker v. Lull Engineering Co., 573 P.2d at 455; Hoven v. Kelble, 256 N.W.2d 379, 391 (Wis. 1977); James, *Products Liability*, 34 TEX. L. REV. 44, 68-77 (1955); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)* 69 YALE L.J. 1099, 1114-17 (1960); Powers, *Distinguishing Between Products and Services in Strict Liability*, 62 N.C.L. REV. 415, 425-27 (1983-84).

[570] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944). *See also* Henningsen v. Bloomfield Motors, 161 A.2d 69, 81 (N.J. 1960) (The court declared: "In that way the burden of losses consequent upon the use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.").

[571] Cowen, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1091 (1965).

[572] Strict liability also creates a market for cost saving substitutes. G. CALABRESI, *supra* note 486, at 75.

[573] Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 717-18 (1965). Another commentator has stated: "Where compensatory damages are the standard remedy for breach of legal duty, the effect of liability is not to compel compliance with law but to compel the violator to pay a price equal to the opportunity costs of the violation." R. POSNER, ECONOMIC ANALYSIS OF LAW 320 (1972).

The formulas used to determine whether a product is defective or unreasonably dangerous reflect the economic orientation of products liability law. Each test relies, at least to some degree, on cost-benefit principles.[574] Safety is important, but the manu-

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[574] Comment, *The Impact of Current Production Management Techniques on the Design-Production Distinction in the Law of Products Liability*, 50 TENN. L. REV. 515, 531 (1983). The three generally accepted tests for evaluating product design are the consumer expectation test, the prudent manufacturer test, and the risk-benefit or risk-utility test.

The consumer expectation test, embodied in § 402A of the RESTATEMENT (SECOND) OF TORTS, but ultimately derived from warranty law, characterizes a product as "unreasonably dangerous" if it reaches the public in a condition that is more dangerous than that contemplated by the ordinary consumer. *See, e.g.*, Young v. Tide Craft, Inc., 242 S.E.2d 671, 680 (S.C. 1978); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 798-99 (Wis. 1975). *See also* Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 305-18 (1967); Fischer, *Products Liabity—The Meaning of Defect*, 39 Mo. L. REV. 339, 348-52 (1974). Because the ordinary consumer expects a product to have some risks, some courts, utilizing this formula, require the jury to balance the product's risks and benefits. *E.g.*, Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 834 (Iowa 1978); Estate of Ryder v. Kelly-Springfield Tire Co., 587 P.2d 160, 163-64 (Wash. 1978). A few courts, however, apply a purely subjective test based on what the plaintiff actually expected the product to be like. *See, e.g.*, Garrett v. Nissen Corp., 498 P.2d 1359, 1364 (N.M. 1972); 242 S.E.2d at 680. *See also* Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 535 (1983).

Under the prudent manufacturer rule, a product is considered defective if a reasonably prudent manufacturer, aware of the product's harmful character, would not have put the product into the stream of commerce. *See, e.g.*, Nicholas v. Union Underwear Co., 602 S.W.2d 429, 433 (Ky. 1980); Cepeda v. Cumberland Engineering Co., 386 A.2d 816, 821 (N.J. 1978); Phillips v. Kimwood Machine Co., 525 P.2d 1033, 1037 (Or. 1974); Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 618-31 (1980); Note, *Reasonable Product Safety: Giving Content to the Defectiveness Standard in California Strict Products Liability Cases*, 10 U.S.F.L. REV. 492, 518-19 (1976). The only difference between the prudent manufacturer rule and the concept of reasonable care, which emphasizes an optimal level of risk, is that the former rule imputes knowledge of the risk to the manufacturer.

The risk-utility test explicitly balances the risk of harm against the utility, or social benefit, of the product. This usually involves a comparison between the product, as designed, and some type of alternative design proposed by the plaintiff. *See, e.g.*, 573 P.2d at 455 (alternative standard); Thibault v. Sears Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978); Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). *See also* Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973); Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973). Most jurisdictions that apply this standard, however, do not expressly instruct juries to balance risk against utility. Rather, the trial judge more often uses the test to decide whether the plaintiff's case is sufficient to go to the jury. *See* Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045, 2050 (1984).

facturer must also consider elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor.[575]

Strict liability, therefore, is intended to induce the product manufacturer to make a cost-benefit analysis between accident costs (deaths and injuries to consumers) and accident reduction costs (more safety features or better quality control) and to act on that decision after it is made.[576] However, making this sort of trade-off, where serious known risks are involved, can easily give rise to liability for punitive damages even though the decision appears cost efficient when made. Unfortunately for product manufacturers, juries have not accepted the concept of cost-benefit analysis, at least where human life is concerned, with the same enthusiasm as economists and legal scholars.[577] One commentator described the manufacturer's dilemma:

> As Professor Calabresi has suggested, the American public harbors a deep-seated belief—nurtured, no doubt, by our Judeo-Christian ethic—that life is of infinite or near infinite value. To claim that the "value of life . . . is reducible to a money figure" works a serious "affront to [society's] values." Now it may well be that authorities like Calabresi and the California Supreme Court do not really believe that life is a priceless pearl; but much of the public does so believe—or at least professes that it so believes. So long as jurors are drawn—as they must be—from the general population, it seems un-

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[575] *See* FINAL REPORT, NATIONAL COMM'N ON PRODUCT SAFETY 69-72 (1970). *See also* Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347, 355-56 (1980). For a discussion of how cost-benefit analysis is employed in corporate decision making, see F. MOORE, MANUFACTURING MANAGEMENT 342 (5th ed. 1969); R. OLSEN, MANAGEMENT: A QUANTITATIVE APPROACH 462 (1968).

[576] Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060-67 (1972).

[577] A number of legal scholars have argued that too much emphasis is placed on economic efficiency in discussions about products liability law, while significant noneconomic considerations are not given sufficient attention. *See generally* Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978); Hubbard, *Efficiency, Expectation, and Justice: A Jurisprudential Analysis of the Concept of Unreasonably Dangerous Product Defect*, 28 S.C.L. REV. 587 (1977).

> realistic to expect the jury to disregard this basic belief either in determining liability or in ruling on punitive damages. With appropriate rhetoric, a skillful plaintiff's lawyer can vivify and dramatize, for the jury's benefit, the traditional public sense of the sanctity of life.[578]

Grimshaw reflects how conscious risk taking could result in the imposition of punitive damages. A California intermediate appellate court in *Grimshaw* affirmed a $3.5 million punitive award primarily because Ford Motor Co. "decided to defer correction of the [Pinto's] shortcomings by engaging in cost-benefit analysis balancing human lives and limbs against corporate profit."[579]

The evidence in *Grimshaw* revealed that when crash tests first indicated that the Pinto's fuel system was vulnerable to rear-end collisions, Ford had considered whether to proceed with the original design of the Pinto or whether to correct the problem.[580] A study known as the Grush-Saunby Report estimated that Ford could substantially reduce the fuel leakage hazard at a cost of eleven dollars per vehicle.[581] Since 11 million cars and 1.5 million light trucks were affected, the total cost of redesigning fuel systems would have been $137 million.[582] The study undoubtedly was undertaken in good faith since it was part of the routine cost calculation process and was not intended to be made public.

The Grush-Saunby report also estimated the cost of retaining the original design.[583] According to the study, 180 burn deaths and 180 serious burn injuries could be expected, and 2100 vehicles would be damaged if no corrective action were taken.[584] Significantly, fewer than 0.2 percent of the Ford automobiles were expected to be involved in the type of accident in which the fuel tank would explode in this manner. Moreover, the risk of death or serious injury was even less—on the order of 0.001

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[578] *See* Schwartz, *supra* note 37, at 152 (footnotes omitted).

[579] 174 Cal. Rptr. at 384.

[580] *See id.*

[581] *See id.* at 376. The cost benefit figures are reproduced in Owen, *supra* note 42, at 56 n.264.

[582] *See* Owen, *supra* note 42, at 56 n.264.

[583] *See id.*

[584] *See id.*

percent. The study estimated the "unit cost" of these consequences at $200,000 per death, $67,000 per injury, and $700 per vehicle for a total cost of $49.5 million.[585] While these dollar estimates may seem absurdly low, they were based on the National Highway Traffic Safety Administration's own cost calculations for traffic injuries and fatalities.[586] If the Grush-Saunby report represented an apparently accurate estimate of Ford's potential liability, the company made what it thought was an economically rational decision. It refused to spend $137 million to prevent $49.5 million in accident costs. This is precisely the type of analysis that strict liability principles encourage product manufacturers to make.

In retrospect, of course, Ford made a tragically wrong decision. Even if its prediction about the number of injuries was accurate, the company's estimate of per accident cost was far too low. If Ford had more realistically estimated the cost of burn injuries and deaths, these "costs" would probably have exceeded the $137 million break-even point. For this reason, the Pinto was probably defective and Ford could properly have been required to pay compensatory damages to those killed or injured. In the absence of additional aggravating circumstances, however, the design decision alone in *Grimshaw* should not have been sufficient to justify an award of punitive damages.

Punitive damages should not be awarded merely because the product manufacturer in cost-benefit analysis underestimates the cost or incidence of known risks. A single product design often involves hundreds of tradeoffs between cost, performance, and safety.[587] Even the proponents of punitive damages caution that exemplary awards should not be imposed in "close calls" to give manufacturers leeway for good faith mistakes.[588] Otherwise, manufacturers will overdesign their products, forcing the public to pay for safety features that are not cost efficient.[589]

It is not necessarily suggested that manufacturers like Ford Motor Co. should be free to subject consumers to the risk of

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[585] *See id.*

[586] *See* U.S. DEP'T OF TRANSPORTATION, SOCIETAL COSTS OF MOTOR VEHICLE ACCIDENTS: PRELIMINARY REPORT 1-5 (1972).

[587] Nelson, *supra* note 12, at 385.

[588] Owen, *supra* note 42, at 28.

[589] *See generally* Wheeler, *supra* note 373, at 307-08.

being burned to death when the hazard can be avoided at a small per unit cost. Society does not always have to make economically efficient choices; it is free to require a higher degree of safety than the market will support. However, such decisions must be made collectively (and prospectively) in the form of legislative or administrative safety standards.[590] But once society elects to have safety standards set by market forces, it must accept the market's decision.

7. *Evaluation of the Deterrence Rationale*

However well punitive damages may deter individual wrongdoers, they do not appear to operate effectively as a deterrent in the products liability area. Some product manufacturers will escape liability altogether by shifting it onto the public, while other companies may be overdeterred. Moreover, the social cost of achieving this suboptimal level of deterrence is likely to be much higher than any corresponding social benefit. A more efficient solution would be to identify undesirable activities and proscribe them through direct governmental regulation.[591]

III. PROPOSED REFORMS

Although the use of punitive damages in products liability actions does not promote either retributive or utilitarian goals, many courts will apparently continue to utilize this device. Consequently, one should consider whether punitive damages can be

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[590] A collective standard may be imposed on product manufacturers for one of two reasons. First, moral or other noneconomic issues may be involved that outweigh any societal concern for efficiency. G. CALABRESI, *supra* note 486, at 100. Thus, if society believes that it is immoral to subject even a small number of drivers to the risk of death or serious injury from exploding fuel tanks, it may require automobile manufacturers to design fuel tanks that will not explode even if doing so is not cost efficient. Second, collective decisions are often made where society believes that market mechanisms do not function adequately as a means of inducing manufacturers to achieve an optimal level of product safety. This is a problem when consumers are unable to determine the true risk posed by a particular product. Schwartz, *supra* note 491, at 453. For example, Consumer Reports magazine initially failed to discover the danger associated with the Pinto's fuel tank. Sales of Pintos declined substantially, however, once the risk became known. Schwartz, *supra* note 37, at 149. This confirms our conclusion that Ford Motor Co. underestimated the "costs" of such accidents in its cost-benefit analysis.

[591] *See* Note, *supra* note 26, at 430; Comment, *supra* note 45, at 374.

changed to conform more closely to the needs of products liability litigation. Any proposed changes, however, must ensure fairness to the defendant at trial and must also promote an acceptable level of deterrence.

A. Changes in Trial Procedure

Commentators have suggested a number of changes in trial procedures to give greater protection to the defendant when victims of defective products seek punitive damages. These include requiring a higher standard of proof, allowing bifurcation of the trial, and requiring the judge, rather than the jury, to determine the size of the punitive award.

1. *Requiring a Higher Standard of Proof*

Although exemplary damages cannot be justified solely in terms of punitive or retributive goals,[592] the consequences of a punitive award are somewhat like those of criminal sanctions.[593] In particular, like a criminal conviction, an award of punitive damages can have a stigmatizing effect.[594] For this reason, it is necessary to ensure that only the guilty are stigmatized in this manner. One means of preventing innocent persons or business entities from being unjustly punished is to require the plaintiff to meet a higher standard of proof to recover punitive damages.[595]

A higher standard of proof already is mandated in some cases where stigmatization results, such as termination of paren-

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[592] *See* notes 245-65 *supra* and accompanying text.

[593] *See* Note, *supra* note 285, at 1161-73.

[594] *See In re* Paris Air Crash, 622 F.2d 1315, 1322 (9th Cir.), *cert. denied,* 449 U.S. 976 (1980). Courts have declared that punitive damages reflect the community's condemnation of "reprehensible conduct" and express "social condemnation and disapproval." Gertz v. Welch, 418 U.S. 323, 350 (1974). Arguably, therefore, punitive damages, unlike compensatory damages, stigmatize the defendant by impugning his good name in much the same manner as a criminal conviction. *See* Wheeler, *supra* note 373, at 282-83. Other commentators, however, have expressed doubts that punitive damages have any stigmatizing effect on the defendant's reputation. *See* Comment, *supra* note 29, at 410-11.

[595] *See* Addington v. Texas, 441 U.S. 418 (1979); Wheeler, *supra* note 373, at 296-98.

tal rights,[596] deportation,[597] and civil commitment proceedings.[598] A few states also have imposed a similar requirement in cases where punitive damages are sought. For example, Colorado presently requires that punitive damages be established by proof beyond a reasonable doubt,[599] while a "clear and convincing" standard has been adopted by the drafters of the Uniform Products Liability Act[600] and is required by statute in Oregon,[601] Minnesota[602] and Montana.[603] In addition, the "clear and convincing" standard has been endorsed by a federal court of appeals in *Acosta v. Honda Motor Co.*,[604] by the Maine Supreme Court in *Tuttle v. Raymond*,[605] and by the Wisconsin court in *Wangen v. Ford Motor Co.*[606] The *Wangen* court declared:

> The issue of whether the defendant acted maliciously or in willful or reckless disregard of the plaintiff's rights, justifying recovery of punitive damages, falls within the "certain classes of acts" for which stigma attaches and is a more serious allegation than the ordinary factual issue in a personal injury action. Therefore, for all punitive damage claims we adopt the middle standard for the burden of proof for the issue of whether the defendant's conduct was "outrageous."[607]

Of course, some wrongdoers go unpunished or undeterred if a higher standard of proof is mandated. Just as in criminal proceedings, however, a higher standard of proof may be necessary to ensure minimum standards of fair treatment for defendants.[608]

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[596] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982).

[597] *See, e.g.*, Woodby v. I.N.S., 385 U.S. 276, 285 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization); Nishikawa v. Dulles, 356 U.S. 129, 133 (1958) (expatriation).

[598] *See, e.g.*, 441 U.S. at 431.

[599] *See* COLO. REV. STAT. § 13-25-127(2) (1973).

[600] *See* UNIFORM PRODUCTS LIABILITY ACT § 120(A), *reprinted in* 44 Fed. Reg. 62,714 (1979).

[601] *See* OR. REV. STAT. § 30.925(1) (1979).

[602] *See* MINN. STAT. ANN. § 549.20 (West Supp. 1981).

[603] *See* MONT. CODE ANN. § 27-1-221 (1985).

[604] 717 F.2d 828, 839 (3d Cir. 1983).

[605] 494 A.2d 1353, 1362 (Me. 1985) (clear and convincing standard applicable to all types of punitive damage claims).

[606] 294 N.W.2d 437, 457-58 (Wis. 1980).

[607] *Id.* at 458.

[608] *See* Wheeler, *supra* note 373, at 311-13.

2. *Bifurcation of the Trial*

Another procedural reform is to permit bifurcation of the trial so that compensatory and punitive damages issues are considered separately.[609] Bifurcation of punitive damages cases would allow the jury to receive all relevant evidence relating to liability for compensatory damages in the first trial; if the jury found in favor of the plaintiff on this issue, evidence relating to punitive damages issues could then be considered in a subsequent proceeding.[610] Bifurcation ensures that when a jury considers liability and compensatory damages issues, it will not have heard potentially inflammatory evidence that may be relevant only to the question of punitive damages. Moreover, if a higher standard of proof is required on the question of punitive damages, bifurcation reduces confusion when the jury is required to apply two different evidentiary standards.[611]

Bifurcation already is allowed in the federal courts[612] and in many states[613] under provisions that permit the trial judge to order separate trials of claims or issues when necessary to avoid confusion, prejudice, or delay.[614] A California court recently tried compensatory and punitive damages issues separately in a products liability case and was upheld on appeal.[615] Of course, there are disadvantages to the bifurcation technique. Bifurcation, for example, may increase the complexity and expense of the trial.[616] For this reason, it has been suggested that bifurcation undermines the goals of deterrence by increasing the plaintiff's litigation expenses and discouraging plaintiffs from pursuing valid claims.[617] Nevertheless, this sort of tradeoff may be necessary

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[609] Wheeler, *supra* note 373, at 320-22. *See generally* J. GHIARDI & J. KIRCHER, *supra* note 21, §§ 12.01-.13; Note, *The Dubious Extension of Punitive Damage Recovery in Pennsylvania Product Liability Law*, 23 DUQ. L. REV. 681, 705 (1985).

[610] *See* Fulton, *supra* note 443, at 129-30.

[611] *See* Wheeler, *supra* note 373, at 300-02.

[612] *See* FED. R. CIV. P. 42(b) [hereinafter cited as FRCP].

[613] *See* J. GHIARDI & J. KIRCHER, *supra* note 21, § 12.05, at 15.

[614] *See* FRCP 42(b).

[615] Hilliard v. A.H. Robins Co., 196 Cal. Rptr. 117, 129-30 (Cal. Ct. App. 1983). *See* notes 165-71 *supra* and accompanying text.

[616] *See* Ghiardi & Kircher, *supra* note 34, at 47-50.

[617] *See* Wheeler, *supra* note 373, at 321.

to endow the punitive damages procedure with an acceptable degree of fairness.

3. *Judicial Assessment of the Punitive Damage Award*

A more drastic solution is to require that the judge, rather than the jury, determine the size of the punitive award.[618] This procedure currently is employed by statute in Connecticut[619] and also is advocated by the Uniform Products Liability Act.[620] It would parallel the practice in criminal cases where the trial judge determines the sentence after conviction by the jury.[621]

Of course, reducing the jury's role in the adjudication of punitive damages claims is a significant departure from tradition. According to conventional wisdom, the jury is thought to function as the community's conscience, and its reaction of shock and outrage to the defendant's conduct when punitive damages are awarded is presumably an accurate reflection of societal values. Likewise, when setting the amount of the award, the jury determines the degree of punishment that the public feels is necessary to deter the defendant and others like him from repeating the offense.[622] However, the rough justice of the community may be less appropriate in products liability cases than it is in cases involving individual wrongdoing. In the former situation, judges may be more sensitive to the economic and social dimensions of exemplary damages.[623] Also, judges are less likely to be unduly persuaded by counsel or influenced by passion or prejudice.[624]

B. Limits on the Size of Individual Awards

Various proposals have also been made to control the size of individual awards to prevent both disproportionate punish-

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[618] *See* DuBois, *supra* note 38, at 352-53; Mallor & Roberts, *supra* note 47, at 663-66; Seltzer, *supra* note 395, at 60-61; Wheeler, *supra* note 373, at 302-03; Sales & Cole, *supra* note 5, at 1167.

[619] *See* CONN. GEN. STAT. ANN. § 52-240(b) (West Supp. 1982).

[620] *See* UNIFORM PRODUCTS LIABILITY ACT § 120(b), *reprinted in* 44 Fed. Reg. 62,714 (1979).

[621] *See* Note, Exemplary Damages, *supra* note 7, at 530; Note, *supra* note 285, at 1171.

[622] *See* Borowsky, *supra* note 7, at 152-53.

[623] *See* Wheeler, *supra* note 373, at 302.

[624] *See* Mallor & Roberts, *supra* note 47, at 664.

ment and overdeterrence. One suggestion is to require a fixed ratio between compensatory and punitive damages.[625] Another is to impose a fixed dollar limit on individual punitive awards.[626]

The first proposal requires that exemplary damages bear some reasonable relation to the size of the compensatory award. Many courts and juries already may apply this theory,[627] at least implicitly, since the ratio of punitive to compensatory damages in reported cases has seldom exceeded two to one.[628] In addition, a number of courts have endorsed the general proposition that a punitive damages award must reasonably relate to the size of the compensatory damages award.[629] Unfortunately, no court ever has provided a clear standard to determine the proper proportion between compensatory and punitive damages.[630] One solution, of course, is to adopt a specific formula. Connecticut, for example, now limits punitive damages in products liability cases to twice the plaintiff's actual damages.[631] However, any rule that ties the amount of the punitive award to the size of the compensatory award arguably will undermine the deterrent effect of punitive damages.[632]

A second proposal imposes a flat dollar limit on the size of any punitive award.[633] This approach is mandated by statute in a number of areas outside of the products liability context.[634] A

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[625] *See, e.g.*, CONN. GEN. STAT. ANN § 52-2406 (West Supp. 1981) ("If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff.").

[626] *See* Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1804-05 (1978-79).

[627] *See, e.g.*, Rosener v. Sears Roebuck & Co., 168 Cal. Rptr. 237, 243 (1980) ("reasonable relation"); Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719, 724 (Mo. 1966) ("must bear some relation"); Parker v. McGinnes, 594 S.W.2d 550, 552 (Tex. Civ. App. 1980) ("reasonably proportioned"). *See generally* Comment, *supra* note 375.

[628] *See, e.g.*, cases cited *supra* note 43.

[629] *See* cases cited *supra* note 375.

[630] *See* Belli, *supra* note 2, at 11-12; Riley, *supra* note 417, at 216, 224.

[631] *See* CONN. GEN. STAT. ANN. § 52-240(b) (West Supp. 1981).

[632] *See* Mallor & Roberts, *supra* note 47, at 531, 666; Note, *supra* note 285, at 1170-71.

[633] *See* Note, *supra* note 626, at 1804-05.

[634] *See, e.g.*, CAL. PROB. CODE § 612 (West 1956) (fraudulent disposition of decedent's property—double value of property); CAL. CIV. PROC. CODE § 735 (West 1980)

House Resolution proposed in 1981[635] adopts this approach, limiting recovery to the lesser of twice compensatory damages or one million dollars.[636] A new Montana statute limits punitive damages in most cases to $25,000 or one percent of the defendant's net worth, whichever is greater.[637] Absolute dollar limits on recovery arguably reduce the risk that the jury will impose excessive punitive damages. Even if the award is influenced by improper factors, the dollar limitation ensures that the award will not exceed a predetermined amount.[638] In addition, the use of a statutory maximum may enable potential defendants to estimate more accurately the internalized costs of their contemplated actions, a result that promotes deterrence. At the same time, however, the deterrent effect of punitive damages may be undercut if the dollar limit on punitive awards is too low.[639]

C. Measures to Limit Aggregate Liability

The underlying problem with the use of punitive damages to achieve deterrence is that the deterrent effect is based on the cumulative cost of wrongdoing to the manufacturer, but punitive damages must be awarded on a case by case basis. Consequently, it is necessary to provide a mechanism for limiting aggregate liability if punitive damages are to provide any sort of deterrent effect. One way to limit aggregate liability is to inform the jury of past and potential liability faced by the defendant. A more direct response is to limit the defendant's liability to a single punitive damage award.

1. *Informing the Jury of Other Awards*

One solution is to inform the jury that other compensatory or punitive awards have been rendered against the defendant

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(forcible entry of a building—three times actual damage); CAL. PROB. CODE § 792 (West 1956) (fraudulent sale—double the value of land sold); CAL. CIV. PROC. CODE § 732 (West 1980) (waste of property—treble damages); CAL. CIV. PROC. CODE § 733 (West 1980) (trespass—treble damages); CAL. CIV. PROC. CODE § 735 (West 1982) (unlawful entry—three times actual damages).

[635] H.R. 5214, 97th Cong., 1st Sess. (1981).

[636] *See* Note, *supra* note 28, at 472.

[637] *See* MONT. CODE ANN. § 27-1-221 (1985).

[638] *See* Wheeler, *supra* note 373, at 299.

[639] *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 389 (Cal. Ct. App. 1981); Note, *supra* note 626, at 1804-05; Note, *supra* note 4, at 74-75.

and that the jury should take this into account in determining an appropriate damage award.[640] However, the full effect of the defendant's misconduct might be unknown when the first few claims are litigated.[641] Moreover, evidence of prior punitive damages awards may prejudice the manufacturer's case with respect to the contested liability issues. In fact, evidence of past misconduct might sufficiently enrage the jury that it would feel the defendant deserved further punishment.[642]

2. *Limitation to a Single Punitive Damage Award*

A superior approach would allow assessment of only one punitive damage award against the defendant. In this way, an appropriate amount, sufficient to achieve deterrence, could be determined once and for all. This not only would promote deterrence goals, but would also do away with the problem of multiple punishment.[643] Perhaps for these reasons, this proposal has received judicial support.[644]

A variation on this idea is to allow awarding of punitive damages until some aggregate figure is reached. Professor Owen suggests an amount equal to "the lesser of either five million dollars or five percent of a defendant's net worth, after which punitive awards would be limited to an amount equal to attorneys' fees and other litigation costs."[645] Under an alternative scheme, later plaintiffs would recover only that amount of their judgment greater than the highest amount awarded previously.[646] In this way, the defendant's total punitive damages liability would be only as great as the largest award thought proper by the most vindictive jury.[647]

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[640] *See* K. REDDEN, *supra* note 39, at § 4.8(a); Note, *supra* note 26, at 419-20. *See also* notes 417-18 *supra* and accompanying text.

[641] *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-39 (2d Cir. 1967); Note, *supra* note 4, at 69-70.

[642] *See* Seltzer, *supra* note 395, 58-60.

[643] *See* Tozer, *supra* note 47, at 304; Note, *supra* note 380, at 155. *See also* notes 420-23 *supra* and accompanying text.

[644] *See* deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1231-32 (10th Cir. 1970); Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1285-86 (2d Cir. 1969); State *ex. rel.* Young v. Crookham, 618 P.2d 1268, 1274 (Or. 1980).

[645] *See* Owen, *supra* note 42, at 49 n.227. *See also* Riley, *supra* note 417, at 252.

[646] *See* Note, *supra* note 626, at 1800-01.

[647] *See* Note, *supra* note 28, at 475.

Each of these proposals is subject to the same criticisms. All of them encourage early trial requests by rewarding plaintiffs who make it to trial earliest.[648] In addition, each proposal allows a small number of plaintiffs to recover the largest judgments, leaving subsequent claimants with lesser or no recoveries, merely because early plaintiffs could finance the litigation.[649] Perhaps the early plaintiffs deserve to receive greater recoveries to offset the proportionately greater expense they bear in proving the initial punitive damages claim, or perhaps they are being recompensed for the corresponding benefit they are rendering to later plaintiffs by laying the ground work for subsequent claims.[650] Nevertheless, it seems inequitable to limit punitive damage awards to a lucky few and exclude all others from an opportunity to litigate their claims.

D. Punitive Damage Class Actions

As suggested earlier,[651] piecemeal adjudication of multiple punitive damages claims is unlikely to achieve an acceptable level of deterrence. On the other hand, rules that cut off liability once some aggregate figure has been reached are unfair to late plaintiffs, who would be unable to recover punitive damages at all. A better approach would adjudicate all punitive damages claims arising from a single design defect at the same time. The most promising method of achieving this objective is the class action suit.

Under this proposal plaintiffs would be allowed to bring compensatory damage claims in the forum of their choice, but would be required to join their punitive claims in a single class action suit.[652] Evidence relevant to the punitive damages issues, such as the extent of the defendant's wealth, the number, nature, and cost of the injuries allegedly caused by the defendant's act, and whether the defendant's act was reckless or malicious would be presented by the named plaintiffs representing the punitive

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[648] *See* Note, *supra* note 649, at 75.

[649] *See* Seltzer, *supra* note 395, at 55-56.

[650] *See* Comment, *supra* note 7, at 679.

[651] *See* notes 379-405 *supra* and accompanying text.

[652] *See* Froud v. Celotex Corp., 437 N.E.2d 910, 913-14 (Ill. App. Ct. 1982); Riley, *supra* note 417, at 252. *But see* Comment, *supra* note 7, at 678.

damages class.[653] Upon a finding by the jury that the defendant was liable for punitive damages, the court would ask the jury to award one sum sufficient to punish the defendant once for all potential claimants.[654] Any sum awarded would then be allocated to class members who filed a claim within a specified time,[655] and according to a judicially approved formula.[656]

1. *Advantages of the Class Action*

In a class action, an invention of equity,[657] a group of plaintiffs with similar causes of action are permitted to sue through one or more representatives without each of the class members having to join in the suit.[658] The class action does not necessarily have to dispose of the entire controversy. Under Federal Rule of Civil Procedure 23(c)(4)(A), class action treatment can be limited to particular aspects of the dispute.[659] According to its supporters, a class action for punitive damages secures the plaintiffs' interests when the defendant's ability to pay is limited.[660] It also protects the defendant, and promotes judicial economy.

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[653] *See* Note, *supra* note 21, at 1807.

[654] *See In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 920 (N.D. Cal.), *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 917 (1983).

[655] *See* Note, *supra* note 21, at 1807 n.108.

[656] *See* 526 F. Supp. at 920 n.184.

[657] The modern class action evolved from the English bill of peace which allowed members of a group to represent the group in court if the group was too large to permit joinder, if the members of the group had a common interest in the issue in dispute, and if the members of the group before the court could adequately represent the absent members. *See generally* Chaffe, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1303-07 (1931-32); Larimore, *Exploring the Interface Between Rule 23 Class Actions and the Anti-Injunction Act*, 18 GA. L. REV. 259, 262 (1984); Stickler, *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DE PAUL L. REV. 73, 74-75 (1984); Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 590 (1973-74).

[658] *See* Comment, *Federal Rules of Civil Procedure—Litigation of Mass Air Crashes*, 29 RUTGERS L. REV. 425, 427-28 (1975-76).

[659] *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01 (2d ed. 1974).

[660] *See In re* "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 725-28 (E.D.N.Y. 1983); Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom.*, Union Light, Heat & Power Co. v. United States Dist. Ct., 588 F.2d 543 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979). *But see* Comment, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 PAC. L.J. 1273 (1981-82).

The class action suit benefits plaintiffs in three ways. First, all plaintiffs are assured of an equal opportunity to assert their claims for punitive damages in a class action.[661] Second, class members pay only a prorated share of the costs of litigation,[662] thereby enabling them to hire better and more experienced attorneys.[663] Finally, a class action reduces potential conflicts of interest among plaintiffs' attorneys.[664]

A class action for punitive damages is also advantageous to the defendant. First, a class action lessens the risk of overkill because a single resolution of the punitive damages issue enables the judge and jury to carefully consider the matter, and award the total amount necessary to both punish the defendant and deter others.[665] Second, a class action decreases the defendant's costs to litigate the issue of punitive damages in multiple suits in various forums.[666] Lastly, the class action reduces the number of lawsuits involving the same parties, issues, and facts, and thereby promotes judicial economy.[667]

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[661] *See In re* Federal Skywalk Cases, 680 F.2d 1175, 1185-86 (8th Cir. 1982) (Heaney, J., dissenting); 521 F. Supp. at 1192-93.

[662] *See* 680 F.2d at 1185. Not only are the parties able to pool their resources, but also the court determines what hourly rate represents reasonable value for services rendered. Class counsel do not receive a contingent fee. Gordon, *The Optimum Management of the Skywalks Mass Disaster Litigation by Use of the Federal Mandatory Class Action Device*, 52 U.M.K.C.L. REV. 215, 224-25 (1984).

[663] *See* 526 F. Supp. at 921.

[664] *See* 93 F.R.D. at 425; 526 F. Supp. at 895 n.22; Note, *supra* note 21, at 1809. A conflict of interest can occur "when an attorney who represents more than one client seeks punitive damages on behalf of each" client against a defendant who may not be able to satisfy all judgments rendered against it. Note, *supra* note 4, at 70-71. In this situation, the attorney must decide which cases to proceed with first, a decision that may require him to sacrifice the interests of one client for the benefit of another client. *Id.*

[665] *See* Putz & Astiz, *supra* note 36, at 23.

[666] *See* Comment, *supra* note 658, at 451.

[667] *See generally* Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 756 (1976-77). Consolidation is another device that is frequently used to promote efficiency and reduce litigation costs. The Judicial Panel on Multidistrict Litigation has transferred a number of products liability cases to a single district for consolidation or pretrial coordination of discovery. *See, e.g., In re* Cutter Laboratories, Inc. "Braunwald-Cutter Aortic Heart Valve" Prod. Liab. Litig., 465 F. Supp. 1295 (J.P.M.D.L. 1979); *In re* the Upjohn Co. Antibiotic "Cleocin" Prod. Liab. Litig., 450 F. Supp. 1168 (J.P.M.D.L. 1978); *In re* Swine Flu Immunization Prods. Liab. Litig., 446 F. Supp. 244 (J.P.M.D.L. 1978); *In re* A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig., 406 F. Supp. 540 (J.P.M.D.L. 1975). Actions can also be consoli-

2. *General Requirements of Federal Rule of Civil Procedure 23*

At the present time, a punitive damages class may be certified in federal court only if it meets the requirements of Federal Rule of Civil Procedure 23(a). These are classified as: (l) numerosity of class members; (2) commonality of legal and factual questions; (3) typicality of claims and defenses of the class representative; and (4) adequacy of representation.[668] If these four prerequisites are satisfied, the court must then determine whether the case fits within one of the categories of class action specified in Rule 23(b).[669]

First, pursuant to Rule 23(a)(1), the class must be so numerous that joinder is impracticable.[670] Since the number of injured parties is invariably quite large, in design defect litigation numerosity will rarely present a difficult hurdle when using a class action to assess punitive damages.[671]

Second, Rule 23(a)(2) requires the presence of questions of law or fact common to the class.[672] In punitive damage class actions, the conduct of the defendant is generally the primary question at issue. Because this evidence is identical for all parties seeking punitive damages, the prerequisite of commonality usually will be satisfied.[673]

Third, Rule 23(a)(3) requires that the class claims be similar, although not identical, to the claims of the representative party. Usually all of the individual punitive damages claims are nearly

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dated for trial where all of the lawsuits have been filed in the same district. FRCP 42(a). In products liability actions, however, lawsuits will generally be filed in more than one district, thereby almost certainly frustrating any attempt to consolidate them for trial in a single proceeding.

[668] Seltzer, *supra* note 395, at 65 (citing A. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 22-31 (1977)).

[669] Seltzer, *supra* note 395, at 65-67; Note, *Diethystilbestol: Extension of Federal Class Action Procedures to Generic Drug Litigation*, 14 U.S.F.L. REV. 461, 481-90 (1980).

[670] Payton v. Abbott Labs, 83 F.R.D. 382, 387 (D. Mass. 1979).

[671] Note, *supra* note 380, at 165 n.75. *See generally* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1762 (1972) [hereinafter cited as WRIGHT & MILLER].

[672] Note, *supra* note 380, at 166.

[673] Note, *supra* note 380, at 166. *But see* 693 F.2d at 850.

identical.[674] As mentioned above, the primary focus in such cases is on the defendant's conduct. Similarly, the claim of any individual member representing the class would also center on the defendant's conduct and thus meet the typicality requirement.[675]

Finally, adequacy of representation, which must be determined in each case,[676] turns on the "availability of a representative party, the competence of the representative party's counsel, the extent of the representative party's interest, and the absence of any conflicting or antagonistic interests between class members."[677] A representative party may be difficult to locate because punitive damages imposed in individual cases are usually larger. Individual plaintiffs anticipating larger individual awards are reluctant to act as the representative party.[678]

In addition to satisfying the four prerequisites of Rule 23(a), the class action must fall within one of the situations described in Rule 23(b).[679] In punitive damage class actions, the court could use either Rule 23(b)(l)(B) or Rule 23(b)(3).

3. *Class Actions Under Federal Rule of Civil Procedure 23(b)(l)(B)*

Rule 23(b)(1) applies to situations where a class action can prevent the prejudicial effect that otherwise occurs when a large number of individual lawsuits are brought against a common defendant.[680] Rule 23(b)(1) is divided into two subsections: Rule 23(b)(1)(A) authorizes class actions to protect the opposing party against having to meet incompatible standards of conduct when dealing with different members of the class;[681] Rule 23(b)(1)(B)

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[674] Note, *supra* note 380, at 167 (citing WRIGHT & MILLER, *supra* note 671, § 1764, at 218 n.21.4).

[675] Note, *supra* note 380, at 167. *See also* 83 F.R.D. at 387-88 (typicality does not require total identification of interests).

[676] FRCP 23(a)(4); WRIGHT & MILLER, *supra* note 671, § 1765, at 622.

[677] Note, *supra* note 380, at 167. *See* Johnson v. Georgia Highway Express, 417 F.2d 1122, 1124-25 (5th Cir. 1969) (evidentiary hearing can be held on this issue); *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 788 (E.D.N.Y.), *rev'd,* 635 F.2d 987 (2d Cir. 1980); WRIGHT & MILLER, *supra* note 671, at §§ 1765-68.

[678] Note, *supra* note 380, at 167.

[679] Seltzer, *supra* note 395, at 66.

[680] *Id.*

[681] Dale Elec., Inc. v. RCL Elec., Inc., 53 F.R.D. 531, 537 (D.N.H. 1971).

protects litigants when recovery by some plaintiffs impairs others' chances, as when the defendant possesses limited resources for satisfaction of claims.[682] These class actions are mandatory in the sense that, after class certification, the eventual outcome of the suit binds all class members regardless of whether they agree to be included in the proceeding.[683]

Despite the apparent advantages of class actions, only one court has ever certified a products liability class under Rule 23(b)(1)(B) for the purpose of adjudicating punitive damages claims.[684] The federal court for the Northern District of Califor-

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[682] Note, *supra* note 21, at 1797, 1800. The Advisory Committee Comments state:

> In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the law suit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. . . .

Advisory Committee Comments, 39 F.R.D. 69, 101 (1966).

[683] Seltzer, *supra* note 395, at 66.

[684] 526 F. Supp. at 890. Certification under Rule 23(b)(1)(B) was denied in several mass injury products liability cases. *See* McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1086 (9th Cir. 1975) (airplane crash), *cert. denied*, 425 U.S. 911 (1976); Marchesi v. Eastern Airlines, 68 F.R.D. 500, 501 (E.D.N.Y. 1975) (airplane crash); Causey v. Pan Am. World Airways, 66 F.R.D. 392, 398 (E.D. Va. 1975) (airplane crash); Hobbs v. Northeast Airlines, 50 F.R.D. 76, 88 (E.D. Pa. 1970) (airplane crash); Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383, 384 (1977). However, certification was allowed in several non-products liability cases. *See* 77 F.R.D. 43 (E.D. Ky. 1977) (supper club fire); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 559-60 (S.D. Fla. 1973), *aff'd mem.*, 507 F.2d 1278 (5th Cir. 1975) (food poisoning); Gabel v. Hughes, 350 F. Supp. 624, 627-28 (C.D. Cal. 1972) (mid-air collision; issue of liability undecided).

In general, the courts have also been reluctant to use the class action device in any products liability cases. In *Payton v. Abbott Laboratories,* one of the few exceptions, the court certified the case under Rule 23(b)(3). 83 F.R.D. 382. *Payton* involved a suit by "DES daughters" against the manufacturers of the drug DES. The plaintiffs sought to certify a class to determine liability for both compensatory and punitive damages. The court concluded that punitive damages were not recoverable in Massachusetts except as authorized by statute and, therefore, refused to certify a class for this purpose. *Id.* at 395. Nevertheless, the court did consider certification of a class for the purpose of determining liability for compensatory damages. Looking at the criteria under Rule 23(a), the court found that between 13,350 and 53,400 women were exposed to DES, making it likely that the plaintiff class was so numerous that joinder of its members would be impracticable. *Id.* at 387. As to commonality, the court noted that "answers to common questions need not guarantee a determination of liability." *Id.* at 387. The requirement was satisfied because "if the plaintiffs [won] a favorable determination on the class issues, . . . they [would] have established the legal and factual prerequisites to

nia certified a class consisting of all persons having potential damage claims against the manufacturer of the Dalkon Shield IUD.[685] In this case, the court determined that individual recoveries of punitive damages by the early plaintiffs would either reduce or totally eliminate the funds available for recovery of damages by subsequent victims.[686] The court concluded, therefore, that a limited fund existed which justified certification of a Rule 23(b)(1)(B) class action.[687]

According to the court, the funds available for payment of punitive damages claims were potentially limited in several respects. First, the defendants' net worth might be inadequate to satisfy all claims;[688] second, even if the defendants' resources were sufficient, courts might limit the extent to which a defendant could be punished for the same wrongful act.[689] In either case, the court reasoned, only the first plaintiffs receiving favorable verdicts would receive full payment and subsequent plaintiffs would recover little or nothing. Consequently, the court concluded that only a mandatory class action in which all plain-

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[liability]." *Id.*

The court also concluded that the claims and defenses of the named plaintiffs were typical of those of the class. Likewise, the court determined "plaintiffs' counsel [were] capable of competent and vigorous prosecution of the action, that the action [was] not collusive, . . . and that the interests of the named plaintiffs and the absentee class members [were] not antagonistic. . . ." The court, however, refused to certify the class under Rule (b)(1)(B) because the plaintiffs had not shown that the defendants were likely to be unable to pay all claims assessed against them. The court did, however, find that "common questions of law and fact predominate[d] over questions affecting individual members of the plaintiff class and that a class action [was] superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at 389-90. The court also acknowledged that only some of the liability issues would be resolved by the class action and that additional proceedings would have to be held on an individual basis before liability could be ultimately determined. *Id.* at 394. The court explained that bifurcation in this manner was acceptable and that constitutionally separable issues could be tried under the seventh amendment by different juries. *Id.*

[685] 526 F. Supp. at 895. At the time, 1,573 suits were pending against the defendant manufacturer. *Id.* at 893.

[686] *Id.* at 898-99.

[687] *Id.* at 897-98.

[688] *Id.* at 893.

[689] *Id.* at 898.

tiffs were represented could accomplish an equitable distribution to all deserving plaintiffs.[690]

An overwhelming majority of plaintiffs in *Dalkon Shield*, however, vigorously contested the certification order.[691] They based their opposition on the "impropriety of certification on the court's own initiative, the lack of personal jurisdiction over non-California plaintiffs, and the diversity of legal and factual questions presented by the multistate claims."[692] The trial court, however, appeared less concerned about the plaintiffs' objections than about the problems involved with piecemeal assessment of punitive damages.[693] Accordingly, the court ruled that a nationwide class action would be superior to individual adjudications.[694]

Nevertheless, the Ninth Circuit Court of Appeals overturned the certification order.[695] The appellate court found that the class did not satisfy the commonality, typicality, and adequacy of representation prerequisites of Rule 23(a).[696] The appellate court held that the commonality requirement was unsatisfied because the punitive damages issues were "not entirely common" to all potential class members.[697] In the court's opinion, the manufacturer's liability for punitive damages depended on the information it had concerning side effects, its concealment of that information, and its advertising and promotion. Since these factors varied over time, liability would not necessarily be the same for all victims.[698]

The appellate court also addressed the typicality issue. According to the court, the legal standards that controlled whether punitive damages were applicable might differ among individual plaintiffs.[699] Although the court conceded that the typicality

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[691] *Id.* at 897-98.

[692] Seltzer, *supra* note 395, at 74.

[693] *Id.* at 75-76.

[694] 526 F. Supp. at 916-17.

[695] *Id.* at 915.

[696] *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 917 (1983).

[697] Seltzer, *supra* note 395, at 79. *See* 693 F.2d at 851-52.

[698] Seltzer, *supra* note 395, at 79 n.202.

[699] 693 F.2d at 850.

[690] *Id.* at 848.

problem was not insurmountable, it noted that no plaintiffs sought or accepted the role of representative parties.[700] The court also expressed skepticism about the adequacy of representation. The law firm originally appointed as lead counsel by the district court had resigned and no other plaintiff's attorney would agree to serve as lead counsel for the punitive damages class.[701] Although the district court eventually appointed an attorney for this purpose,[702] the appellate court doubted that the trial court could properly manage such complex litigation when many parties vehemently opposed joining the class action.[703]

Finally, the appellate court disagreed with the lower court's finding that a limited fund existed in the manner contemplated by Rule 23(b)(1)(B).[704]The court found that the record did not support the existence of a limited fund.[705] Rule 23(b)(1)(B) certification required more than a showing that subsequent recoveries could be diminished or eliminated by earlier recoveries.[706] Neither the inability of defendants to pay subsequent claims nor the potential ceiling on punitive damages recoveries[707] had been "inescapably" or "necessarily" demonstrated.[708]

Arguably, *Dalkon Shield* was not a typical class action case. As one commentator observed, the certification order in the lower court "amounted to a unilateral assumption of authority over thousands of cases pending in other jurisdictions."[709] Since all plaintiffs opposed class certification while the defendants favored it, a clear sense of unfairness to the plaintiffs arose.[710] In addition, since the court ordering certification had dismissed punitive damages claims in an earlier Dalkon Shield trial, it looked as though A.H. Robins had "forum shopped" for an anti-punitive damages court in which to try all of the punitive

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[700] *Id.* at 850.
[701] *Id.* at 851.
[702] Seltzer, *supra* note 395, at 79 n.204.
[703] 693 F.2d at 851.
[704] *Id.* at 851-52.
[705] *Id.*
[706] *Id.* at 852.
[707] Seltzer, *supra* note 395, at 80.
[708] 693 F.2d at 852.
[709] Seltzer, *supra* note 395, at 82.
[710] *Id.* at 82-83.

damages claims pending against it.[711] Nevertheless, *Dalkon Shield* is hardly an auspicious beginning for punitive damages class actions, and one can anticipate that plaintiff opposition to forced membership in the class, as well as judicial resistance to the limited fund theory, will discourage the use of Rule 23(b)(1)(B) class actions in the future.[712]

Not only may plaintiffs create opposition, but mandatory class actions may violate the Anti-Injunction Act[713] if members of the plaintiff class already have filed state court suits against the product manufacturer.[714] The Anti-Injunction Act was held to apply to Rule 23(b)(1)(B) class actions in *In re Federal Skywalk Cases*.[715] *Federal Skywalk* arose out of the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri. The accident killed 113 persons and injured at least another 212 persons. Approximately 150 lawsuits were filed in state and federal courts.[716] One victim petitioned a federal district court to certify as a class action the claims of business invitees of the hotel who suffered physical, mental, or property damage as a result of the accident.[717] In response, the court certified a class action under Rule 23(b)(1)(A) to determine liability for compensatory and punitive damages.[718] The court also certified a Rule

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[711] Seltzer, *supra* note 395, at 83 n.220.

[712] *See* notes 708, 710 *supra* and accompanying text.

[713] 28 U.S.C. § 2283 (1982). The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.* For a general discussion of the Anti-Injunction Act, see Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978); Reaves & Golden, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294 (1971); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591 (1975).

[714] "It has been recognized that class members may not initiate state court actions once a class action has been certified." Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1159 (1982-83).

[715] 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175, 1181-82 (8th Cir.), *cert. denied*, 459 U.S. 988 (1983).

[716] *Id.* at 419.

[717] *Id.* at 418.

[718] The court concluded that certification under Rule 23(b)(1)(A) was appropriate because "[o]ne or more of the defendants risk[ed] being faced with incompatible standard of conduct if varying or inconsistent adjudications with respect to individual

23(b)(1)(B) class action on the issues of liability for and the amount of punitive damages.[719]

The trial court found each of the Rule 23(a) prerequisites were satisfied. It concluded that the class was sufficiently numerous to satisfy the numerosity requirement.[720] According to the court, the commonality requirement also was met. Since all claims of the class members arose from the same accident, the facts, liabilities, and defenses would be the same. Only the issue of individual damages would differ.[721] Similarly, the typicality requirement was met because the legal theories utilized by the class representatives were the same as the unnamed class members.[722] Finally, the court determined that the class representatives could adequately represent the class interests.[723]

Under the limited fund theory, the court believed that certification of the punitive damages claim was appropriate pursuant to Rule 23(b)(1)(B).[724] Not only were limited funds available to pay for punitive damages claims, but also Missouri law was unclear as to whether a defendant could be liable for more than one award of punitive damages. If a defendant could be punished only once, the court reasoned, the first claimant to get an award would deprive other claimants of any chance to obtain punitive damages. Therefore, the court held that a single class-wide adjudication of the punitive damages issues was necessary to protect the interest of every victim in receiving his or her just share of any punitive award.[725]

Opponents of the class action,[726] however, challenged the certification order.[727] Without deciding whether the class action

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members of the class were obtained on the issues of liability for compensatory or punitive damages." *Id.* at 424.

[719] *Id.* at 424-25. Relying on *Snyder v. Harris*, 394 U.S. 332, 340 (1969), the court declared that the diversity requirement was satisfied if one member of a class is of diverse citizenship from the class' opponent and no nondiverse members are named parties. 93 F.R.D. at 420.

[720] *Id.* at 421.

[721] *Id.*

[722] *Id.* at 421-22.

[723] *Id.* at 422.

[724] *Id.* at 425.

[725] *Id.* at 424-25.

[726] Gordon, *supra* note 662, at 218.

[727] 680 F.2d at 1180.

satisfied the requirements of Rule 23, the federal appellate court vacated the certification order because it violated the Anti-Injunction Act.[728] The appellate court was concerned because the trial court had allegedly prohibited class members from settling their punitive damages claims.[729] In addition, the appellate court declared that the certification order also effectively enjoined the state plaintiffs from pursuing their pending state court actions on the issues of liability for compensatory and punitive damages.[730] This marked the first time any court had ruled that the Anti-Injunction Act could prohibit a federal district court from enjoining parallel proceedings in state courts once class certification took place under Rule 23(b)(1)(B).[731] As a result, it is necessary to examine the Anti-Injunction Act in some detail to determine what future impact it may have on punitive damages class actions.

The Anti-Injunction Act, first enacted in 1793,[732] is intended "to forestall conflicts between federal and state courts when both judicial systems are entertaining suits based upon the same subject matter."[733] Although the original Anti-Injunction Act language prohibited virtually all injunctions of state proceedings,

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[728] *Id.* at 1180, 1184.

[729] *Id.* at 1180. The court quoted the following language from the district court's opinion as the basis for its conclusion:

> Legitimate claimants may negotiate and execute settlements with those defendants who have vociferously urged this court to allow the settlement process to continue. Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damages issues.

Id. (quoting 93 F.R.D. at 428). Nevertheless, other language in the order indicated that class members could settle both their compensatory and punitive claims. Those who released their punitive damage claims, however, would not be permitted to share in any award obtained in the class action. 93 F.R.D. at 419, 422. *See* Gordon, *supra* note 662, at 230 n.44.

[730] 680 F.2d at 1180. This interpretation of the trial court's order is open to serious question. *See* Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180, 1186 n.28 (1983).

[731] Note, *supra* note 714, at 1159 n.69.

[732] Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334-35.

[733] Larimore, *supra* note 657, at 260. For a discussion of the history of the Anti-Injunction Act, see Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1931-32); Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169 (1933).

judicial interpretation of the statute has created a number of exceptions.[734] These exceptions, codified when the Anti-Injunction Act was revised in 1948,[735] are the relitigation exception,[736] the "expressly authorized" exception,[737] and the "in aid of jurisdiction" exception.[738] The purpose of the relitigation exception is to prevent parties from relitigating in state court issues that a federal court has already resolved.[739] The Anti-Injunction Act also allows injunctions against state court proceedings when "expressly authorized by Act of Congress."[740] Finally, the "in aid of jurisdiction" exception "authorizes injunctions against state court proceedings when such injunctions are ancillary . . . and necessary to vindicate, jurisdiction otherwise vested in the federal courts."[741]

The "in aid of jurisdiction" exception is the provision most applicable to the class action situation.[742] This exception, however, generally is used only to protect a specific piece of property or "res," a construction which greatly restricts the exception's application.[743] This interpretation of the "in aid of jurisdiction" exception first[744] appeared in *Kline v. Burke Construction Co.*[745] The plaintiff in *Kline* brought suit in federal court seeking damages for breach of contract. After initiation of the suit, the defendant commenced an action in state court against the plaintiff involving the same issues. The original plaintiff then sought to prohibit the defendant from continuing his suit in state court.[746] The

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[734] Redish, *supra* note 667, at 718.

[735] *Id.*

[736] *Id.* at 722.

[737] *Id.* at 726.

[738] *Id.* at 743.

[739] "The relitigation exception is intended to [avoid] the necessity of relitigating in state court, or having to appear in state court to plead as *res judicata* a judgment previously obtained in federal court. . . . There [must] be an existing federal court judgment" for this exception to apply. Mayton, *supra* note 713, at 355. *See also* Larimore, *supra* note 657, at 284-86.

[740] Redish, *supra* note 667, at 726-43.

[741] Mayton, *supra* note 713, at 356.

[742] Larimore, *supra* note 657, at 288-89.

[743] Mayton, *supra* note 713, at 357.

[744] Redish, *supra* note 667, at 745.

[745] 260 U.S. 226 (1922).

[746] *Id.* at 227-28.

United States Supreme Court, however, ruled on appeal that the state action could not be enjoined.[747]

The Supreme Court found the "in aid of jurisdiction" exception did not apply since only concurrent *in personam* proceedings were involved.[748] The Court reasoned that when a court takes jurisdiction over a *res*, the specific thing is withdrawn from the power of the other court.[749] In contrast, however, "a controversy was not a thing, and a controversy over a mere question of personal liability . . . does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending."[750]

The logic behind this distinction lies in the nature of the court's control over the subject matter in dispute.[751] A court acquiring jurisdiction over property gains exclusive control over it because no other court can physically possess that property at the same time. This situation, however, does not occur in the case of concurrent *in personam* jurisdiction where the only matter before the court is a "question of personal liability."[752] In this instance, each court may proceed independently without regard to the other proceeding. The judgment rendered first will then be given *res judicata* effect by the other court.[753]

While this approach has a certain conceptual appeal, it does not explain why a federal court's jurisdiction also cannot be impaired in some cases involving concurrent *in personam* actions. If there is already a state court judgment on the same *in personam* action, the doctrines of collateral estoppel and res judicata will bind the federal court to the state court factual findings and legal conclusions.[754]

The *Kline* distinctions between *in personam* and *in rem* actions continue to be applied by the courts with little attention to the underlying policies of the Anti-Injunction Act or Federal

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[747] *Id.* at 235.
[748] *Id.* at 230.
[749] *Id.*
[750] *Id.*
[751] *Id.* at 235.
[752] *Id.*
[753] Mayton, *supra* note 713, at 359.
[754] Redish, *supra* note 667, at 746.

Rule of Civil Procedure 23(b)(1)(B).[755] An example of this inattention is seen in the *Federal Skywalk* court's response to the plaintiff class' concern that the purpose of the class action would be defeated by individual state court suits.[756] The court relied on the distinction between *in rem* and *in personam* actions and declared that "simultaneous *in personam* state actions did not interfere with the jurisdiction of a federal court in a suit involving the same subject matter."[757]

One of the exceptions to the *in rem—in personam* distinction is the approach taken in Federal Rule of Civil Procedure 22 interpleader cases. Federal courts frequently have used the Rule 22 interpleader's "in aid of jurisdiction" exception[758] to protect an individual's claim in a limited fund,[759] in both *in rem* and *in personam* actions.[760] When the critical factor in such cases—an identifiable property or limited fund[761]—is present, the courts seem prepared to treat the case as an *in rem* action.[762]

The Rule 22 interpleader cases are significant because some commentators maintain that a class action under Rule 23(b)(1)(B) promotes some of the same policies as the interpleader and should therefore be treated in the same fashion.[763]

> [Thus,] the efficiency of the . . . interpleader depends upon the ability of courts . . . to protect a stakeholder from multiple claims. The effectiveness of the [R]ule 23 mandatory class action certification . . . similarly depends upon that same ability to protect class members from being deprived of their share of the potential, yet possibly limited, punitive damages recovery.[764]

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[755] Larimore, *supra* note 657, at 288. *E.g.*, Alton Box Bd. Co. v. Esprit De Corp., 682 F.2d 1267, 1272 (9th Cir. 1982); Piambino v. Bailey, 610 F.2d 1306, 1330-31 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980); *In re* Glenn W. Turner Enter. Litig., 521 F.2d 775, 780-81 (3d Cir. 1975).

[756] 680 F.2d at 1182.

[757] *Id.* at 1183.

[758] *E.g.*, United States v. Major Oil Corp., 583 F.2d 1152, 1158 (10th Cir. 1978); Emmco Ins. Co. v. Frankford Trust Co., 352 F. Supp. 130, 133 (E.D. Pa. 1972).

[759] Note, *supra* note 21, at 1812-13.

[760] Larimore, *supra* note 657, at 287-88.

[761] *Id.* at 288. *E.g.*, Wallach v. Cannon, 357 F.2d 557, 559-60 (8th Cir. 1966).

[762] Larimore, *supra* note 657, at 288.

[763] *Id.*

[764] *Id.* at 289.

Likewise, it can be argued that class actions, like the interpleader situation, involve a limited fund. In effect, the defendant manufacturer's cumulative liability for punitive damages is equivalent to a limited fund. The plaintiff class in *Federal Skywalk* relied on this analogy when claiming, as in the interpleader situation, that there was a limited fund and a class action was necessary to protect all claimants.[765] The appellate court, however, rejected this contention and held that a claim for punitive damages, when the defendants had not conceded liability, did not resemble a limited fund in that sense: "The claim does not qualify as a limited fund which is a jurisdictional prerequisite for federal interpleader. Without the limited fund there is no analogy to an interpleader and no reason to treat the class action as an interpleader for purposes of the Anti-Injunction Act."[766]

Judge Heaney, in a dissenting opinion, strongly disagreed with the majority's interpretation of the Anti-Injunction Act.[767] He contended that a class action was the most effective means of managing litigation that would arise out of mass disasters such as the collapse involved in *Federal Skywalk*.[768] In addition, he declared: "[A] single class-wide adjudication of punitive damages ensures that every victim receive a just share of the punitive award."[769] With that in mind, Judge Heaney considered whether limiting actions in state court would be necessary to effectuate the purposes of the federal class action.[770] In his view, since Rule 23(b)(1) class actions were mandatory, they must necessarily foreclose members of the class from litigating class issues in another forum:

> A mandatory class action, of course, has a restrictive effect on related proceedings in any other court—state or federal. This is because, by definition, members of such a class cannot pursue independent litigation of class claims . . . . In my view, the plain meaning of a mandatory class does not change merely

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[765] 680 F.2d at 1182. *See also* Larimore, *supra* note 657, at 287-89 (discussing rationale for using class action).

[766] 680 F.2d at 1182.

[767] *Id.* at 1184.

[768] *Id.* at 1186.

[769] *Id.*

[770] *See id.* at 1191-93 (discussing why mandatory class actions do not violate Anti-Injunction Act).

> because some members of the class have previously initiated independent actions. If certification of a mandatory class action is proper, as here it clearly is, then the ordinary rules of such actions simply preclude independent litigation of class claims in state or federal courts.[771]

Judge Heaney then concluded that an injunction to protect the ordinary scope of a mandatory class action was "necessary in aid of" the federal jurisdiction over the class.[772] Otherwise, the federal court would effectively lose its jurisdiction over the class if individual claimants could opt out by suing in state court.[773]

In his dissenting opinion, Judge Heaney also attacked the majority's reliance on the *in rem—in personam* distinction. He observed that the rule had always been confined to individual claims and had never been applied to class actions. According to Judge Heaney, extending the rule to class actions was unwarranted and effectively defeated the purpose of mandatory class action jurisdiction.[774]

It is difficult to assess the probable impact of the *Federal Skywalk* decision on Rule 23(b)(1) class actions. Legal scholars generally have been critical of the *Federal Skywalk* majority opinion, and have supported the dissent's interpretation of the Anti-Injunction Act.[775] Nevertheless, until the Supreme Court makes a definitive ruling on the matter, the *Federal Skywalk* decision is likely to discourage other courts from utilizing class actions in any way that restricts plaintiffs from pursuing their punitive damages claims in state court.

4. *Class Actions Under Federal Rule of Civil Procedure 23(b)(3)*

Federal Rule of Civil Procedure 23(b)(3), the "common question" class action, unlike subsection (b)(1) of the Rule, does not require that the class include everyone who will be directly

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[771] *Id.* at 1191.

[772] *Id.* at 1192.

[773] *Id.*

[774] *Id.* at 1193.

[775] *See, e.g.*, Gordon, *supra* note 662, at 229-33; Larimore, *supra* note 657, at 288-89; Note, *supra* 714, at 1159-60; Note, *supra* note 21, at 1812-13.

affected by the litigation's outcome. It is sufficient that the defendant injure all of the class members in similar ways.[776] Another difference between Rule 23(b)(1) and Rule 23(b)(3) class actions is that the latter are not mandatory and potential class members may opt out if they wish.[777] In addition to the prerequisites of Rule 23(a), Rule 23(b)(3) requires that common questions of law or fact "predominate" over individual issues and that a class action be the "superior" method of handling the litigation.[778] The superiority requirement deals with increased efficiency of the class action.[779] Proponents of the punitive damage class action claim that it meets the superiority requirement by reducing "discovery time, court congestion, repetitive introduction of evidence, and litigation costs."[780]

Arguably, the predomination requirement is also met because the defendant's conduct is a factual question identical for each class member.[781] The courts have utilized a variety of approaches to determine satisfaction of the predomination requirement. Under the "objective" approach, predomination is determined by comparing the amount of time that is to be spent in resolving common issues versus the time spent resolving individual issues. If the time to litigate common issues is greater, the predomination requirement is met.[782] This method, however, is not widely accepted because it does not provide any formula for measuring litigation time.[783] Under the "outcome determinative" test, the predomination requirement is met only if a specific issue's resolution will determine the case.[784] This approach has also generally been rejected because, contrary to the meaning of Rule 23(b)(3), it seemingly would require common issues to be significant rather than predominant.[785]

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[776] A. MILLER, *supra* note 668, at 40.

[777] Note, *supra* note 714, at 1152-53.

[778] Note, *supra* note 669, at 480, 484.

[779] Note, *supra* note 380, at 171.

[780] *Id.*

[781] *Id.* at 171-72.

[782] Comment, *supra* note 730, at 1210-11.

[783] *Id.* at 1211 n.141. *See* Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn. 1968).

[784] Comment, *supra* note 730, at 1211.

[785] *Id.* (citing 3B J. MOORE, *supra* note 659, ¶ 23.45[2], at 323-29).

The most widely accepted approach in resolving the predomination issue is a pragmatic balancing test. Under this approach, the court balances whether a substantial portion of the case is composed of "common questions of law or fact" against whether there is a "common nucleus of operative fact" in the group's claims.[786] This involves an examination of the four factors set forth in Rule 23(b)(3): "(l) whether other litigation has already been commenced; (2) the desirability of concentrating the action in one forum; (3) difficulties in managing the class; and (4) the plaintiff's individual interest in controlling the litigation."[787]

The first factor the court considers is whether members of the potential class already have initiated litigation. If a large number of lawsuits are pending against the defendant by class members, it may be too late to avoid multiple litigation by utilizing a class action.[788] In making its evaluation, the court should "compare the number of pending lawsuits to the size of the proposed class."[789] Thus, in products liability cases, where thousands of persons may be injured, it is possible that a class action would promote judicial efficiency even though some victims would elect to sue on their own.[790]

The desirability of concentrating the litigation in one forum is the next factor examined in this predomination balancing test.[791] The criteria used by the court in resolving this issue include "the convenience to the parties and witnesses, the location of the relevant evidence, and the court's familiarity with the case."[792] It is not clear where the best forum would be in a products liability case, but one possibility is the state where the product was manufactured.[793] The court must also assess the difficulties that might be encountered in dealing with a large group of litigants.[794] These include notification of class members

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[786] *Id. See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 565-66 (2d Cir. 1968) (common nucleus of operative facts); Siegel v. Chicken Delight, 271 F. Supp. 722, 726-27 (N.D. Cal. 1967) (common nucleus of operative facts).

[787] Comment, *supra* note 730, at 1212.

[788] *Id.*

[789] *Id.*

[790] *Id.*

[791] *Id.* at 1213.

[792] *Id.*

[793] *Id.* at 1213-14.

[794] WRIGHT & MILLER, *supra* note 671, at § 1762.

and dealing with the existence of various individual issues.[795] However, such problems are no worse in tort cases with many plaintiffs than in other areas where the class action is used.[796]

Another consideration in resolving the predomination issue is the interest of individual class members in controlling their own separate actions.[797] Severe emotional or physical injury may produce an interest that can outweigh the benefits of the class action device.[798] A common complaint of plaintiffs who do not wish to join the class is that the individual's interest would be harmed by application of a particular state's law. Their interest would be better served by bringing suit in another, more favorable jurisdiction.[799] This argument against predomination, however, has seldom been persuasive.[800] As far as punitive damage class actions are concerned, arguably, since the policies underlying punitive damages do not vary appreciably from state to state, variations in punitive damage standards should not prevent the predomination requirement from being met.[801]

Unfortunately, there are serious disadvantages to the use of Rule 23(b)(3) class actions for the purpose of adjudicating punitive damages claims.[802] Rule 23(b)(3) actions require, under Rule 23(c)(2), "best notice"[803] and allow "opting out."[804] The notice requirement, inapplicable to Rule 23(b)(1) class actions, can be quite burdensome and expensive because all potential class members must be given the best notice practicable.[805] In addition, since this Rule allows class members to opt out, the

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[795] *Id.* § 1780, at 75; Comment, *supra* note 730, at 1214.

[796] Comment, *supra* note 730, at 1214.

[797] *Id.* at 1215.

[798] *Id.* at 1217. *See also* 66 F.R.D. at 399 (individual claimants have right to choose "strategy and tactics"); Yandle v. PPG Indus., 65 F.R.D. 566, 572 (E.D. Tex 1974) (serious personal injuries and death create high individual interest); 50 F.R.D. at 79 ("claims vitally affect . . . lives of claimants").

[799] Comment, *supra* note 730, at 1215. For example, some states allow punitive damages in wrongful death actions, while others do not. *Id.* at 1215 n.167.

[800] Comment, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615, 1623 (1972); Comment, *supra* note 684, at 391-93.

[801] 526 F. Supp. at 915.

[802] WRIGHT & MILLER, *supra* note 671, § 1777, at 44-50.

[803] *See* Note, *supra* note 380, at 172. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (defines "best notice").

[804] Note, *supra* note 380, at 172.

[805] *Id.*

advantages of a class action are lost because plaintiffs can pursue their individual punitive damages claims.[806] Some commentators have suggested that class members who exercise their right to opt out should forfeit their punitive damages claims.[807] While this approach may be constitutional,[808] it seeems inconsistent with the "voluntary" nature of Rule 23(b)(3) class actions.

CONCLUSION

Courts and commentators alike have endorsed the practice of awarding punitive damages in products liability litigation; only product manufacturers and insurance companies seem to view this new development with alarm.[809] Nevertheless, in the author's view, the supporters of punitive damages have yet to make a convincing case.

By hypothesis, exemplary damages are not intended to be compensatory. Therefore, punitive damage awards amount to an involuntary transfer of wealth from product manufacturers to parties who have already received full compensation for their injuries.[810] Those who advocate such a practice must provide compelling reasons to justify it. Although the proponents of punitive damages have offered a number of theories to support the application of this concept in the area of products liability, none of them is persuasive.

The first justification for punitive damages is based on the concept of retribution.[811] Product manufacturers who engage in certain types of undesirable conduct deserve punishment. As we have seen, however, there are a number of problems with the retributive rationale. First, punishment falls largely on innocent third parties rather than on the actual wrongdoers.[812] Second, even visualizing the corporation itself as a legitimate target for

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[806] *Id.*

[807] Putz & Astiz, *supra* note 36, at 23-31.

[808] Note, *supra* note 380, at 172.

[809] Robinson and Kane, *supra* note 15, at 140; Note, *supra* note 33, at 334 n.6; Comment, *supra* note 33, at 771 n.3. *See generally* notes 33-36 *supra* and accompanying text.

[810] *See* notes 1, 7-9, 19-21 *supra* and accompanying text.

[811] *See* notes 238-459 *supra* and accompanying text.

[812] *See* notes 266-83 *supra* and accompanying text.

punishment, the liability standard for punitive damages does a poor job of identifying the type of proscribed conduct.[813] Finally, piecemeal assessment of punitive damage liability in individual lawsuits creates a significant risk of imposing excessive punishment on the product manufacturer.[814] Therefore, we have concluded that retributive principles do not support the assessment of exemplary damages on manufacturers.

Another rationale for punitive damages is deterrence.[815] Here again, there are serious objections to the extension of punitive damages into products liability litigation. Certainly, the fear of massive punitive damages liability will deter some product manufacturers from engaging in unwanted conduct.[816] Unfortunately, some manufacturers will not be deterred because they can shift the cost of punitive damage awards onto the public.[817] At the same time, other manufacturers will no doubt be discouraged from applying the principles of cost-benefit analysis to decisions about product safety. The result will be a misallocation of resources toward risk-avoidance measures.[818]

In the author's opinion, the rapid and almost universal acceptance of punitive damages in products liability litigation reflects a feeling by judges and juries that the concept of strict liability in tort, and the theory of market deterrence upon which it rests, does not always produce socially acceptable results.[819] Even though manufacturers are strictly liable for compensatory damages, manufacturers still sometimes produce excessively dangerous products and engage in unethical marketing practices. Punitive damages are viewed as a way of supplementing, or even superseding, the ordinary liability rules when those rules fail to fulfill their intended social function.

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[813] *See* notes 284-370 *supra* and accompanying text.

[814] *See* notes 371-418 *supra* and accompanying text.

[815] *See* notes 486-591 *supra* and accompanying text.

[816] *See* notes 539-56 *supra* and accompanying text.

[817] *See* note 591 *supra* and accompanying text.

[818] *See* notes 557-90 *supra* and accompanying text.

[819] *See* Acosta v. Honda Motor Co., 717 F.2d 828, 837 (3d Cir. 1983); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382 (Cal. Ct. App. 1981); Palmer v. A.H. Robins Co., 684 P.2d 187, 218 (Colo. 1984); Wangen v. Ford Motor Co., 294 N.W.2d 437, 451-52 (Wis. 1980).

The impact of damage awards in tort actions, however, is indirect and the ultimate effect of such awards on specific corporate behavior is uncertain. This is an inherent weakness of any system of social control that relies on indirect measures to achieve its objectives. Punitive damages suffer from the same deficiency. Therefore, if the public wishes to prohibit certain business practices or to mandate a particular level of product safety it should do so directly by promulgating specific standards of business conduct or product quality. It follows that state and federal regulation offers a more promising approach to the problems of product safety and unethical business practices than does a system of random jury awards of punitive damages.[820]

In fact, much of this regulatory framework is already in place. For example, under the Consumer Product Safety Act,[821] the Consumer Product Safety Commission is empowered to establish safety standards and require suitable warnings for consumer products.[822] Other federal agencies also regulate product safety. The National Traffic and Motor Vehicle Safety Act[823] authorizes the Secretary of Transportation to establish motor vehicle safety standards.[824] The Act also requires manufacturers to provide notification of defects related to motor vehicle safety that are discovered after the product line has entered the market.[825] The agency can order the manufacturer to notify consumers of the danger or to recall the automobiles for correction of the defect.[826] Finally, the Federal Food, Drug, and Cosmetic Act[827] empowers the Food and Drug Administration (FDA) to approve any new drug before marketing[828] and to regulate the content of labeling and advertising in connection with such

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[820] Note, *supra* note 26, at 430.

[821] 15 U.S.C.A. § 2051 (West Supp. 1982).

[822] *See id.* § 2056(a).

[823] *Id.* § 1381.

[824] *See id.* § 1392.

[825] *See id.* § 1411. The notification must contain a clear description of the defect, an evaluation of the risk to motor vehicle safety, and a statement of the measures to be taken to remedy the defect. Id. § 1413.

[826] *See id.* § 1414.

[827] 21 U.S.C.A. §§ 301-92 (West Supp. 1972).

[828] *See id.* § 355(a).

products.[829] The Act also allows the FDA to require adequate testing before new drugs are approved.[830]

Some commentators have doubted that administrative regulation can ever effectively control improper behavior by product manufacturers.[831] This author certainly does not claim that the present fragmented system of federal regulation is adequate. Nevertheless, these provisions can be improved and strengthened to induce product manufacturers to meet their social responsibilities to consumers. Reform in this area is more promising than changing the rules governing assessment of punitive damages.

There may be some, however, who believe that appropriate regulatory measures will not be forthcoming and are willing to accept punitive damages as a temporary measure until a better solution is found. With this in mind, it is useful to consider whether punitive damages principles can be modified by statute to serve some retributive or deterrent function in the products liability area. In all probability very little can be done legislatively to improve the deterrent effect of punitive damages. However, some changes could be made at the state level by statute to make punitive damages more acceptable from the standpoint of retributive justice. Deterrence goals might also be taken into account, but they would be a secondary consideration. The proposed statute should address three problem areas: (1) the liability standard, (2) the adjudicatory process, and (3) calculation of the punitive damage award.

For punitive damages to serve a retributive function, the proposed statute should formulate a liability standard limiting punishment to those who have engaged in wrongful conduct. In addition, the liability standard must clearly identify the type of behavior that will be sanctioned. These requirements can be met if the proposed statute limits punitive damages to fraudulent conduct and knowing violations of government safety regulations. These regulations could include safety-related design standards, testing procedures, disclosure requirements, warning requirements, and provisions requiring the product manufacturer to take remedial actions. In addition, the proposed statute should incorporate some form of "complicity rule" so that shareholders

[829] *See id.* § 352.

[830] *See id.* § 355(j).

[831] Comment, *supra* note 33, at 783.

are not punished for the misconduct of lower level corporate employees.[832]

Because of the quasi-criminal aspects of punitive damages, any statutory proposal must make the adjudicatory process more fair to the defendant. Several of the reforms discussed in Part III should be implemented. First, a clear and convincing standard should be substituted for the present standard of proof.[833] Second, the question of punitive damages should be kept separate from compensatory damages issues to avoid confusing the jury and possibly prejudicing the defendant's case.[834] Third, the trial judge should set the punitive award once the jury has determined that punitive damages are proper.[835]

Calculation of the damages award would be the most difficult aspect of any statutory reform package. As mentioned earlier, the purpose of the punitive damage award should be primarily retributive. The award should be sufficient to punish the defendant but should not be disproportionate to the degree of wrongdoing. Obviously, it is much easier to determine the appropriate level of punishment at one time rather than in some incremental fashion. Consequently, the proposed statute should limit the manufacturer's liability to a single award (at least in that state) for injuries arising from a particular product design.

The class action appears to be the best mechanism to accomplish this objective while ensuring that each victim gets a share of the award. In the alternative, the statute could provide that the state attorney general could bring an action for punitive damages against the manufacturer on behalf of all injured parties within the state.

The proposed statute should also establish a maximum limit on the size of any punitive damage award. This could be either set like a criminal fine at a fixed amount or based on some percentage of the company's net profits during the period when

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[832] The vicarious liability rule adopted by the Restatement of Torts would be appropriate. *See* RESTATEMENT (SECOND) OF TORTS § 909 (1979). *See also* Parlee, *Vicarious Liability for Punitive Damages: Suggested Change in the Law Through Policy Analysis*, 68 MARQ. L. REV. 27, 36-44 (1984).

[833] *See* notes 592-608 *supra* and accompanying text.

[834] *See* notes 609-17 *supra* and accompanying text.

[835] *See* notes 618-24 *supra* and accompanying text.

the defective product was marketed. In either case, the statute should allow the defendant to introduce mitigating evidence showing payment by the defendant of earlier punitive damage awards in other states.

Finally, if the concept of a class action is rejected and individual suits are allowed, the proposed statute should limit individual recoveries to a maximum fixed amount, such as $500,000. As in the case of an aggregate award, the trial judge should be permitted to award less than the maximum amount, and the defendant should be permitted to introduce evidence of prior punitive damages judgments in order to reduce its liability.

Punitive damages are not likely to work very well in the environment of products liability. The reforms suggested above will at least alleviate the worst excesses of this device. Nevertheless, the concept of punitive damages, even as modified, can never be anything more than a stopgap solution to the problem of unethical manufacturers and unconscionably dangerous products.